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BY

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AND

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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INDUSTRIAL COURTS IN AUSTRALIA.

[*Contributed by* THE HON. MR. PRESIDENT JETHRO BROWN.]

IF I were asked to express an opinion as to the most important legislation in Australia in recent decades, I should refer to the Acts which constitute Courts of Industrial Justice. The implications of such Acts are incomparably more significant than may appear from any reference to statutory texts. "Courts" imply adjudication according to rules or principles of law, expressed in statutes, or evolved in a long course of judicial interpretation. The ambit and importance of the rules or principles of law, which are applied by Courts of Industrial Justice, can only be estimated after due consideration of the complex and changing character of modern industrial conditions, and the extent to which the life of the great majority of citizens is governed by those conditions. In Australia, the new realm of law promises to develop into a code which, if it will not eclipse, will at least challenge, the traditional prestige of Criminal and Civil Law. Judging by the existing rate of progress, the parvenu of to-day will be an aristocrat of to-morrow, and some ancient views as to the scope of positive law, and as to the relative importance of the law of master and servant to the totality of law, will undergo a radical change.

While the lawyer may be alarmed, the sociologist may recognise both a natural sequel to the Factory Laws of the last century, and also an adaptation of legal institutions and principles to changes in the social structure—an adaptation long since overdue. Law can never cover the whole ground of human relations; but social progress implies, normally at least, a process in the course of which man passes through the stage of self-help to voluntary arbitration, and later to compulsory governance by Courts. In each stage of this process, usage, habits, and the current ideas of morality and religion, are potent factors in the determination of human relations.

But such factors, either with respect to their content or with respect to their enforcement, are apt to be vague, capricious, and uncertain. Hence the ever-expanding range of compulsory governance by Courts.

The foregoing remarks call for a brief reference to three questions: (1) Are not industrial conditions capable of just settlement by private agencies? (2) Assuming, however, some form of public control, is there any need or justification for an addition to the existing scheme of Courts? (3) Again, admitting Courts of Industrial Justice to be necessary, does it follow that Industrial Law will develop into a code of such magnitude or importance as to challenge comparison with existing codes of Criminal and Civil Law? I propose to refer in brief to these questions, and then to proceed to the main purpose of this article—a relation of the experience of Industrial Courts in Australia, more especially from the point of view of one who regards the failures of legislative experiments (or of institutions constituted under them) as likely to be more instructive to other countries than real or alleged successes.

(1) **Private Agencies of Industrial Amelioration.**—The private agencies of industrial amelioration are multiple, and their achievements such as to suggest an indefinite expansion in the future. Among such agencies, I may cite, by way of illustration, collective bargaining, co-partnership, profit-sharing. I do not wish to minimise the importance of such agencies. They have been slowly developing, and they will probably continue to develop. The question I now ask is whether there is a reasonable prospect that they will serve in the future the purpose of rendering some form of public control and supervision a superfluity? In considering this question, one has to attach due importance to such factors as the following: Class tradition; the comparative solidarity of labour; the relation of trade unions to labour politics, and consequent disposition on the part of labour to consider the value of any proposed amelioration from the point of view of its influence on the possession of political power; the ever-changing conditions of modern industry; the present and prospective standards of popular education; and the multiple forms of business organisation according to the size of the business unit, or other circumstance. I do not propose to enlarge upon these factors; I merely express the opinion that, when they

are viewed collectively, they go to show the need for an ever-expanding range of State authority and regulation.

(2) **Public Control.**—Assuming public control to be inevitable, is there any need or justification for Courts of Industrial Justice? In answering this question, I do not desire to minimise the value of such institutions as Australian Wages Boards, or of various public agencies which have been devised with a view to conciliation or arbitration in industrial disputes by public authorities. Much good work has been done in the past, and I believe will continue to be done, by such institutions or agencies. But occasions have arisen (and seem likely to arise with increasing frequency) when forms of amicable negotiation by State authority fail. Even the tact of an archangel, be he the most dignified of public servants, will not invariably suffice to settle industrial disputes. At times the failure may be unimportant; at other times the very existence of an established social order may be endangered. Further, a scheme of public supervision of private-owned industry, which does not include Industrial Courts, is subject to a fatal weakness. Its operation, normally at least, is particular or sectional rather than general. It is directed to the settlement of particular disputes, not to the creation of standards which will prevent disputes from arising. Hence an apotheosis of the spirit of compromise or opportunism. Under modern conditions, the realm of law alone can ensure in the long-run that industrial stability which is essential both to success in business enterprise and to the well-being of workers and the community. Some disturbing object-lessons may be found in recent Australian experience. America has provided examples of amicable agreements between a trust and its employees at the expense of the consumer. In Australia, if not in other countries, there have been examples of combination between the employers and employees in a particular industry, *and the Government of the day*—all parties being satisfied, whilst the consumer has been penalised, and the way has been paved for discontent amongst classes of wage-earners in other industries. Until Industrial Courts are constituted, and are empowered to do justice between parties, without doing injustice to others than parties, I see no hope of any reasonable standardisation of wages and conditions throughout industry at large.

(3) **Industrial Courts.**—Assuming Courts of Industrial Justice

to be necessary or even desirable, does it follow that Industrial Law will develop into a code of such magnitude or importance as to justify a comparison with the existing codes of Criminal or Civil Law? Before answering this question, some popular preconceptions deserve mention: (*a*) The traditional belief in the adequacy of the "law of supply and demand" as a just determinant of labour conditions dies hard. It is sufficient to say that the law would justify conditions immortalised in the "Song of the Shirt." This is quite consistent with a due acknowledgment of the fact that supply and demand have operated in the past, and will continue to operate in the future, even under a system of Industrial Courts. Employers often contend that the action of Industrial Courts is one-sided, since, when labour is plentiful, the minima have still to be paid, whereas, when labour is scarce, supply and demand operate in favour of the worker. I must assume that Legislatures have thought that, since life is more than property, the protection of the wage-earner is of primary importance. I may add that supply and demand *do* operate in favour of employers when labour is plentiful in respect of the quality of labour for which minimum or other rates have to be paid. Further, the operation of supply and demand in favour of the worker when labour is scarce is not without limitation. No law, civil or economic, compels an employer to pay wages in excess of what will enable him to net a fair profit on his output. (*b*) Collective bargaining, though but a disguised form of force and therefore open to various objections, may continue to operate even under a system of Industrial Courts. But the operation is qualified by a progressive development of the Rule of Law. An Industrial Court not only settles disputes, but also gives, or should give, reasons for its decisions. The reasons are formulated with due regard to the social good as well as to the argument and evidence on behalf of parties. So far as the reasons survive the test of practical experience, they constitute standards which, while restricting the *laissez-faire* doctrine of freedom of contract, do not so much eliminate collective bargaining as direct the general lines along which such bargaining may be effected with the least degree of friction, and the greatest degree of justice to parties and the community. (*c*) Among many reformers there appears to exist a belief that, assuming that industrial matters should be dealt with by Courts of Justice in accordance with reasoned

principles, those principles are comparatively few in number and easy in application. The belief probably owes its origin to a failure to realise the complexity of the modern organisation of industry, and is less entitled to respect than the belief in the completeness of the Ten Commandments as a final statement of the moral code, or the belief which was doubtless entertained by the early Romans as to the adequacy of the Twelve Tables. The layman who should chance to read the Statute of Frauds would probably think that it left nothing to be decided as regards the occasions when contracts should be in writing. Yet the decisions which have been given in interpretation of the Statute would fill a library. To take an illustration from a different province of thought, what shall be said of the golden rule of "Do unto others," etc.? In fact, the working out of this rule, and its application to the circumstances of human life, reveal the necessity for an indefinite expansion. So it is with regard to certain elementary maxims and principles which may have been adopted by Industrial Courts in an early stage of their existence. They are at best a very imperfect beginning; and they require continuance, adjustment, qualification, modification, and addition, in order to meet the infinitely complex and varying conditions of modern industry.

To illustrate the quantum of law involved in the establishment of Industrial Courts (not immediately but ultimately), I will refer specifically to the question of the rate of wage, though that is but one of the many questions with which such Courts have to deal. The principles of wage justice may be considered under three headings: (*a*) The Living Wage; (*b*) the Primary Minimum; and (*c*) the Secondary Minimum.

The Living Wage.—An Industrial Court must necessarily construct its scheme of wages on some basis. That basis may be called a Living Wage, a Basic Wage, a Wage necessary for a Decent Livelihood, etc. etc. For purposes of convenience, I call it a living wage. In the South Australian Industrial Arbitration Act (omitting cases of aged, infirm, or inexperienced workers), the Court is precluded from prescribing a wage less than a living wage. The living wage is defined as "a sum sufficient for the normal and reasonable needs of the average employee living in the locality where the work under consideration is done or to be done." To the layman, such a definition may seem beautifully simple and clear.

In reality, nearly every word requires judicial interpretation. For example, the living wage cannot be the result of a mere assessment of customary expenditure of wage-earners in general, since a large proportion of them are skilled. Nor, again, would it be safe to rely upon the customary expenditure of unskilled wage-earners, because that expenditure is determined by their income, and their income is determined by a pre-existing wage, the reasonableness of which is really in issue. The words " normal " and " reasonable " qualify and complement one another. A wage may be normal which is not reasonable, and reasonable though not normal. Again, it is impossible to evade the relation of the reasonable needs of the unskilled worker to the question of the equitable distribution of the national income. The question is primarily ethical. There is also the economic question as to what a given community can afford to pay as the bed-rock level. Again, conditions change. Hence the living wage requires adaptation from time to time. The questions arise, How often and under what circumstances should the adaptation be made? In this connection, it is important to distinguish between statistics relative to variations in the *purchasing power of money* and the *living wage.* The purchasing power of money is tested by reference to the prices of a given number of commodities, the cost of which may vary indefinitely without calling for a corresponding adaptation of the living wage. This statement can be made without suggesting such an abnormal substitution of commodities as took place in Germany during the War. Again, one has to distinguish between the living wage in town and in country areas. The distinction involves principles of public policy owing to the tendency of modern life to excessive concentration of population in the urban areas. Again, is the living wage for men to be a family wage, and if so, how many children are to be allowed for? What principles should be adopted for deciding the relation of the rates of wage for men and women respectively? The foregoing questions are sufficient to illustrate the difficulties involved in an assessment of the living wage in accordance with defined principles. The principles have to be evolved by Industrial Courts; and they imply an ever-broadening growth of precedent.

Primary Minimum.—The Living Wage is the bed-rock wage. It may or may not be the Primary Minimum. When an Industrial

Court adjudicates in a particular industry, it may fix for unskilled labour a higher wage than the living wage. The Primary Minimum involves reference to such considerations as the abnormally laborious, disagreeable, or unhealthy character of the work to be done, or the hours in which the work is done, or the prosperity of the industry. The principles applicable are only in process of formation. I should add that I do not regard the casual character of an employment as a matter calling for consideration under this head. Any addition to the normal living weekly wage, on the ground of the casual character of the employment in a particular industry, is one of the many unmentioned issues involved in the assessment of the living wage. If in a particular industry the worker on an average gets only forty hours' employment per week, and some days ten hours' work, and some days four, a living wage of 8*s.* per eight-hour day means, not 1*s.* per hour, but say 1*s.* 2½*d.* per hour. So also in seasonal industries, the estimate of the living wage cannot ignore the time lost in travelling to and from the locality where the employment is to be had, travelling expenses, and, in my opinion, some time for regaining employment after the labour in the seasonal industry is terminated. Again, in an industry where the employee has an exceptional charge on his wages as the result of the necessity of maintaining appearances, the fact must be considered in assessing the living wage.

Secondary Minimum.—Beyond the Primary is the Secondary Minimum for skill, etc.—a minimum which should be estimated with respect to the industry (*or grade*) under consideration and such factors as the following: (*a*) The nature of the strain, tension, or effort demanded of and displayed by the employee; (*b*) the responsibility imposed on the employee; (*c*) the sacrifices imposed on the employee in the way of training, preparation, education, etc.; (*d*) the market value of the work done by the employee—allowance being made for a reasonable profit to the employer; (*d*) the social welfare of the community as a whole. Such factors have to be considered both in relation to men and women workers, and to adult and junior workers. If anyone thinks that the resulting criteria of wage justice could be applied without a great mass of precedent, defining, qualifying, and supplementing earlier decisions, he can have given little thought to the subject. The single issue of the relative secondary rates of remuneration to be

paid to men and women workers involves a progressive statement of principles, which ramify in many directions, and demand a wide view of feminist aspiration and achievement in relation to the common good.

Industrial Matters.—I have been trying to show that, even on the mere question of wage fixation, a large body of Industrial Law is involved. But the rate of wage is only one, and often not the most important, of the matters which come before an Industrial Court. The South Australian Industrial Arbitration Act gives the following definition of " Industrial matters " :

" Industrial matters " means matters or things affecting or relating to work done or to be done, or the privileges, rights, or duties of employers and employees, or of persons who intend or propose to be employers or employees in any industry, not involving questions which are or may be the subject of proceedings for an indictable offence ; and, without limiting the ordinary meaning of the foregoing definition, includes all or any matters relating to—

(*a*) The wages, allowances, or remuneration of any persons employed or to be employed in any industry, or the piecework, contract, or other prices paid or to be paid in respect of that employment, including the wages, allowances, or remuneration to be paid for work done during overtime or on holidays, or for other special work, and also including the question whether piecework shall be allowed in any industry.

(*b*) The hours of employment in any industry, including the lengths of time to be worked to entitle employees therein to any given wages, allowances, remuneration, or prices, and what times shall be regarded as overtime.

(*c*) The sex, age, qualification, or status of employees, and the mode, terms, and conditions of employment, including the question whether persons of either sex shall be disqualified for employment in an industry.

(*d*) The number or proportionate number of apprentices and improvers that may be employed by an employer in any industry.

(*e*) The relationship of master and apprentice.

(*f*) The technical education or other training of apprentices.

(*g*) The employment of children or young persons, or of any person or class of persons in any industry.

(*h*) The right to dismiss or to refuse to employ or reinstate in employment any particular person or class of persons in any industry.

(*i*) Any claim of members of an association of employers to preference of service from unemployed members of an association of employees.

(*j*) Any claim of members of an association of employees that members

of such association shall be employed in preference to persons who are not members thereof.

(*k*) Any established or alleged established custom or usage of any industry, either general or in any particular locality.

(*l*) The interpretation of an award, or of an industrial agreement, or of a determination or order of a Wages Board, or of an agreement under s. 48 of "The Factories Act Amendment Act, 1910."

(*m*) All matters with which Wages Boards appointed under the Factories Acts have power to deal under any Act now or hereafter in force.

(*n*) All matters prescribed.

(*o*) All questions of what is fair and right in relation to any industrial matter having regard to the interests of the persons immediately concerned and of society as a whole.

I have referred to the need for a wide extension of public control over industrial matters, the need for Industrial Courts as a form of such control, and the extent and importance of the code of Industrial Law which such Courts evolve by process of judicial interpretation. The main purpose of this article, however, is to give a summary statement of Australian experience of Industrial Courts, more especially from the point of view of real or alleged failures and mistakes. Either successes or failures have to be viewed in the light of the fact that the institution under consideration is only in the pioneer or experimental stage.

The Successes of the Court.—I speak first of the successes. When Wages Boards were first constituted, many reformers appeared to have thought that the industrial problem was solved! But the system of Wages Boards was handicapped by defects in statutory enactment as to the mode of constituting the Boards, and as to the limitation of their functions. From time to time such defects have received legislative consideration. But Wages Board legislation has not been able to cope with the results incidental to industrial segregation and discordant determinations. Further, among employees there has been a feeling that their representatives on the Wages Boards are unable, for one reason or another (including a fear of subsequent victimisation), to hold their own against the representatives of the employers. Industrial Courts, endowed with an original and appellate jurisdiction, were created to make more effectual the system of Wages Boards, and to supplement their action. Incidentally, it became possible to make the strike

or lockout a criminal offence. The net result has been so far successful that the great body of employees and employers support Industrial Courts. The support may be seldom enthusiastic, but it is a reality. The Courts ensure a measure of co-ordination and stability; they provide a judicial authority to appeal to; they constitute an alternative to industrial anarchy; on an appeal from a Wages Board they substitute reason and justice for capricious bargaining; in cases where Wages Boards have or have not jurisdiction, they save the humane employers from the unfair competition of "the twentieth man," who is apt to set the pace under the competitive system of industry; and, incidentally to the duty of regarding industry as a whole (as well as to do justice between the parties), they afford an opportunity to evolve standards which tend to simplify, and rationalise, the determinations of Wages Boards, and agreements between employers and employees not before the Court.

The Failures of the Courts.—The successes which may be credited to Industrial Courts have been achieved in a varying degree, according to circumstances. They are merely referred to *en passant*, as I have already expressed the opinion that the mistakes and failures (particularly the avoidable failures) are likely to be of more interest and value to other countries. On the debit side, it is a fact that in Australia we have our full measure of strikes, and much friction between employer and employee, and the general accompaniments of class warfare. Before drawing any conclusion from this fact, however, the reader should give due reflection to the existence of a number of causes productive of industrial unrest. What are those causes? The more important, speaking of the present time, may be classified as follows: (1) The drift of world ideas imported into Australia from countries where labour has been sweated and means of constitutional redress have not been available. The class war concept, for example, has gained in Australia a quite exaggerated significance as a result of its growth in countries where conditions are wholly dissimilar. (2) An exaggerated expectation of economic beatitudes which were to follow immediately on the conclusion of the war. For several years the manhood of Australia and our financial resources have been sidetracked in order to contribute to the struggle for world-wide freedom and justice. Despite the fact, there exists in Australia, as elsewhere,

the expectation of additional real wages and shorter hours (whether conducive to economic efficiency or not), just as if no war had taken place. Nothing could be more shortsighted, or more likely to mislead and betray. No arbitrary fixation of wages can escape natural and inevitable consequences. For some time to come—I hope the time may be short, but certainly for some time—the economic possibilities of the country in the way of raising real wage standards are affected. Meanwhile, however, industrial discontent grows, and a unique opportunity is afforded to extremists who vary in their panaceas for social ills, but agree as to the possibility of a millennium, to-day or to-morrow! (3) Failure on the part of a large section of the employing class to recognise the full significance of agencies at work before the war, such as democratic institutions, popular education, and the growth of trade unionism. Mr. C. M. Schwab has recently said: "We are at the threshold of a new era. . . . It means but one thing, and that is that the man who labours with his hands, who does not possess property, is the one who is going to dominate the affairs of this world—not merely Russia, Germany, and the United States, but the whole world." The statement does less than justice to the possibilities that the workers may fail, through lack of leadership or other causes, to achieve the result predicted. But employers, as a class, are slow to recognise the undoubted strength of the forces which tell for social and industrial readjustments. (4) Failure among a large section of employees, or their leaders, to recognise that the increased power which they can possess, if they choose, can only result in a general amelioration of the conditions of the working class if the power be exercised with wisdom and moderation, and with due regard to the good of society as a whole. (5) The increased cost of living. (6) The failure throughout Australia generally, despite our machinery for the regulation of industrial conditions, to provide adequate means for harmonising awards of the different Australian Industrial Courts, so as to bring about standard wages and conditions of employment. The ordinary employee is not in a position to judge of the financial outlook of a community and its economic possibilities; but he is able to compare himself with, and does compare himself with, other employees. If he finds discrepancies existing in the rates of wages or other conditions, naturally he complains. (7) The social unrest. Per-

sonally, I think the existing industrial unrest is, to a larger extent than is commonly imagined, a phase of social unrest generally, due to the existence of causes beyond the ken of Legislatures or Courts—not wholly, but largely. The social unrest is partly an aftermath of the war, symptomatic of a relaxation of tension, and not unnatural in the case of a people struggling to return to its normal life. I have said " partly," because the malaise in question existed to a large extent before the war, and continued throughout the war. The plain fact is that every class and section of the community appear to be dissatisfied. Perhaps the great mass of the people have lost their chart of life, and find no real substitute. Passion, desire, caprice, greed, tend to give the social tone in all classes, though in different forms. I doubt if even the " profiteer " is satisfied with his profits.

It should be apparent that Industrial Courts, functioning under the conditions indicated, are not likely, despite wide powers, to ensure that industrial peace and order which is desirable from so many points of view. But the particular question I now propose to consider is whether, making an allowance for *unavoidable* adverse conditions (whether long-standing or of recent growth), Industrial Courts in Australia have been, or are, as successful as might be reasonably expected? My answer must be in the negative. One anticipated consequence of the constitution of Industrial Courts, however, I do not propose to discuss, because I regard it as non-existent or temporary. I have in mind the view that what is most needed is for employers and employees to meet in friendly negotiation. As a matter of fact, omitting all references to the important institution known as the Wages Board, cases that come before Courts for judicial settlement are frequently settled out of Court, under the exercise of conciliatory powers conferred by statute on industrial judges. A little tact, some straight talk, and a judicious appeal to the spirit of fair play, have achieved much, and should continue to achieve much. Where an industry, however, is very complicated, or party feeling dominates, the Industrial Court may be necessary. It has been tried in Australia in such cases. Why has there been less success than might be reasonably expected?

(1) **Uniformity of Decision.**—When speaking of the adverse conditions with which Industrial Courts have to cope, I alluded to the lack of any provision for harmonising the awards of the various

Australian Courts. In this connection, it is necessary to observe that there are both Commonwealth and State Courts. The statutory definition of the purposes of the Commonwealth Industrial Control is " Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." By the irony of fate, this subsection in the Commonwealth Constitution, which was designed to prevent, and if necessary to settle, industrial disputes of an inter-state character, has been the means of increasing them. A large body of Australian workers believe, with what justification I do not presume to say, that the Commonwealth Court is likely to give a more sympathetic hearing than the State Courts. As a result of this belief, a dispute in one State has often meant the manipulation of a corresponding dispute in another State, so as to confer Federal jurisdiction. It is impossible to say to how large an extent Australian industrial troubles are due to this state of affairs. Various solutions have been suggested. It has been said that, since State Courts are more intimately informed of local conditions, and are more directly subject to public criticism, the Commonwealth Court ought to be abolished. The chief objection to this solution of a difficult problem is that, as Australia enjoys a single fiscal system, a strong *prima facie* case exists on this ground alone for harmonising divergent State awards. Further, such industries as shipping are obviously matters for consideration by a Federal Court in the exercise of an original jurisdiction. Attempts have been made to bring the Industrial Courts, Commonwealth, and State into line, as regards fundamentals, by conferences of industrial judges. Such conferences have so far proved ineffectual. My own opinion is that the troubles arising from conflict of State and Federal jurisdiction can be best overcome by the institution of an Appellate Tribunal, with power to grant leave to appeal, and to hear the appeal from Federal or State Courts. If such an appellate Court had existed, a great deal of our industrial troubles would have been avoided, and a far more substantial advance would have been made towards that standardisation which is a condition of industrial stability. That such an appellate tribunal has not been established is, to my mind, a severe indictment of Australian political action. I have already shown how the origin of State Industrial Courts related to the necessity for standardising the determinations of Wages Boards in different industries.

On a particular Wages Board, the employers may be too strong, or the employees may be too strong, or the chairman may be biased. As the result of any of these conditions, a Wages Board may arrive at a determination out of all reasonable relation to the determinations of other Wages Boards. With this lesson already before the Australian community, the failure to realise the need for harmonising Federal and State awards appears lamentable and culpable. The failure has had disastrous results. While partly due to the misdirected influence of politicians who think more of aggrandising Commonwealth or State " Rights," as the case may be, the failure is probably traceable in the main to a complete misapprehension of the importance of Industrial Court decisions. As things are, a Full State Civil Court may give a decision on an issue involving a few hundred pounds, with a right of the defeated party to appeal to the Commonwealth High Court, and thence to the Privy Council. A single industrial judge may give a decision involving the very existence of an industry, or possibly an additional charge on a particular industry of hundreds of thousands per annum, without those who are affected having the power to appeal from the decision. For example, in the matter of wages, the addition of a few pence per day seems of trifling significance to those not affected. When, however, the few pence are multiplied by the number of working days in the year, and again multiplied by the number of employees concerned, the capitalised result may easily run into millions. I may add that the institution of an appellate tribunal, constituted of a Commonwealth and two State judges, should lessen rather than increase litigation. When once certain fundamentals, such as relate to the living wage, had been settled, I do not think that the appellate jurisdiction of the new Court would often be invoked. The judgments of the Court would bind existing Courts, and so act as a corrective of some judicial idiosyncrasies to which I shall refer later.

(2) **The Personnel of the Courts.**—Appointments to the Industrial Bench have been made by the Executive of the day—sometimes, it is alleged, with a political object—the party in power choosing the person most likely to satisfy the immediate aspirations of its own electorate. Obviously, such a person may be a sound lawyer, and may have the best of intentions, and yet be handicapped from the start by a political bias. The question of political appointments

to the Bench has often been the subject of controversy. Most of the criticisms which have been urged against such appointments apply with a greater degree of force to appointments of industrial judges who have to act as a buffer between Capital and Labour, to prevent disputes from arising where that can be done by prompt and anticipatory action, and to settle them, when they do arise, in accordance with the strictest impartiality. I assume that a public official of high standing will naturally do his best to rise to the occasion; I assume that industrial judges throughout Australia have sought to act up to the light that is within them; but they are human, and the task of continuously striving to make sure that the light within them is not darkness, difficult in any case, is the more difficult if they chance to have been appointed for a party purpose. Possibly no other form of appointment can be devised. It is some consolation to reflect that a Court of Industrial Appeals, which may be regarded as inevitable, will necessarily exercise a potent corrective influence. Even if the Court be constituted by a particular Government, its personnel would be varied, and its decisions would undergo a more severe ordeal of enlightened public criticism than is at present operative.

(3) **General Principles.**—That the utility of Industrial Courts in Australia has been prejudiced by defects in legislative enactments goes without saying. It is more important to note that administrative action, while achieving certain successes, has been too often characterised by a dominating desire to settle some particular dispute, and therefore without due regard to ulterior effects upon other industries—effects which an industrial judge at a very early stage of his career learns to keep in mind. What is wanted is not the mere settlement of particular disputes—though that may seem, and may even be, of great importance—but the settlement of disputes in accordance with principles of reason and justice which will admit of general application. A Minister of State, though representative of the Government of the day, is seldom qualified for the purpose indicated. Occasions do arise when he can be of great service; but it has too often happened that Ministerial intervention has not been limited to such occasions, or that, where so limited, it has been exercised in ways which have done more harm than good. A Royal Commissioner, appointed to consider the results of direct governmental action on a recent occasion, reported:

"In the light of the facts and the inferences that may be legitimately drawn from them, it seems to me impossible to avoid the conclusion that, so far as the colliery employees in the Maitland district are concerned, the demand for increased rates and the concession to that demand made by Federal authority on May 2, 1919, were unwarranted by anything in the existing situation, considered merely from an industrial or economic standpoint. There is no doubt that the average earnings of the colliery employees in the other fields were at the time, with a few exceptions, below the standard of necessary requirement, and, no matter how the low averages may have been aggravated by the action of the men themselves, something had to be done to meet a situation of general stress and individual hardship. It may be questioned, however, whether it was wise, on any ground, to lay upon an essential product like coal an impost to serve an immediate purpose of relief, which, in the circumstances under which it arose, was primarily one of benevolence, without regard to whether the industry should permanently support the burden, and also, apparently, without regard to the probable or possible effect on the general economic situation that must be faced after the war. Particularly does this question arise in a case where, after the emergency has passed, the consequences of precipitate and ill-considered action can only be redressed at the cost of industrial disturbance and discontent."

(4) **Equation between Wages and Production.**—The development of rules or principles by judicial process in any department of law is necessarily subject to various defects. The process of broadening from precedent to precedent implies a relatively slow, possibly inconsistent, and certainly interstitial, development. In the case of Courts of Industrial Justice, the ill-effects are more apparent on account of the wide ambit of the parties, and the rapid changes both in the cost of living and in the methods of industrial organisation. It is not surprising that there exists a difference in point of view among industrial judges—a difference easily discernible, though seldom enounced. Some judges prefer swift decisions without any adequate statement of the principles on which the decisions are based; other judges, holding that the development of a rational code of Industrial Law is even more important than the speedy settlement of particular disputes, prefer to adopt the alternative of stating the reasoned principles on which particular decisions

are based. The latter alternative is, in my opinion, at once more scientific and more truly practical. Not only are employers and employed as classes better informed as to what attitude the Court is likely to take in the future—a condition precedent of efficient regulation by law—but also the particular parties in the case feel they have had a "fair run for their money." Personally, I have often been surprised by the attitude of acquiescence in decisions which I have given when those decisions were adverse. I am not here thinking of ordinary cases with regard to which it may be safely said that judgments will offend both parties. I have in mind a special degree or kind of adverseness. I do not flatter myself by supposing that in such cases my reasons for judgment have invariably convinced. But if parties are assured that the argument and evidence have been comprehensively considered, while the assurance may not alter opinion as to the merits of a claim or counterclaim, it does affect the mental attitude of those who are to be subject to an award, even when, for example, I have reduced a pre-existing rate of wage. It goes without saying, however, that even the most carefully prepared and reasoned judgment is fallible. The practical problem which confronts a judge is to reduce mistakes to the minimum, and to improve as he goes along. An historian could do useful service by cataloguing the judicial blunders, and indicating their origin or cause. Speaking as a member of the Industrial Judiciary, I hope that I may say, without any reflection on other people, that in my opinion the main mistakes have been due to a failure to recognise with any degree of adequacy the need for, and the problems involved in, establishing an equation between wages and conditions on the one hand, and the national production on the other.

(5) **Failure to prevent Strikes.**—The failure of Industrial Courts to prevent strikes calls for special consideration, if only because such failure may appear to negative the extension of the Rule of Law to industrial relations. The more apparent causes of the failure are the following: (*a*) World unrest. The Australian worker cannot take up his morning paper without reading cables about strikes which are, or can be made to appear, successful in securing some gains. The justification or excuse for the strike, the ultimate effects of the strike, and the reality and extent of apparent gains, are usually shrouded in mystery. In any case, the

example is contagious. (*b*) The local unrest resulting from the divergent standards and methods of the Commonwealth and State Courts. (*c*) The fact that the system of Industrial Courts is in its infancy; the weight of tradition is opposed to extension of the Rule of Law; opposition may be effectively overcome when only particular individuals are concerned. Where class or sectional interests of a large part of the community are concerned, a period of educational activity may be a condition precedent to the triumph of the spirit of legality. The example of laws against duelling is not so much in point as the laws passed in behalf of Prohibition. There are bound to be violations of such laws. The practical question with regard to the laws against the strike or lockout is whether such violations can be gradually diminished in number, and ultimately become so abnormal as to be regarded in the same category as a violation of the law against theft.

I turn from causes at present operative to consider the possibilities of future development. At the outset, I wish to express the opinion that the difficulties of enforcing a law against strikes are apt to be greatly exaggerated. The fining or imprisonment of particular strikers; financial levies on trade unions involved; a power to enforce payment of fines by making such payment a charge on future wages; and the deporting of strike leaders—cumulatively considered, such means are quite adequate to enforce the Rule of Law in industrial relations, assuming that public opinion is sufficiently educated, and that legal means of redress are available. During the period of transition from conciliation to compulsory arbitration, however, it must be recognised that there may be times when a certain amount of "blood-letting," in the metaphorical sense of the term, besides being inevitable, may serve useful purposes, chiefly educational. Strikes involve a direct and immediate loss of wages; they throw out of gear allied industries; they penalise the consumer; and they sometimes, owing to external competition or other cause, destroy a particular industry. The cumulative result of such things is to reinforce the legal institutions for dealing with strikes. Incidentally, they serve to put the "fear of God" into the hearts both of employees and of employers. In order that a system of compulsory arbitration may be made completely effective, it is only reasonable to expect a period of transition, in the course of which individuals, classes, and sections of the com-

munity are educated to a conception of the strike or lockout as being a *crime from the point of view of the social conscience.*

(6) **Lack of Public Support.**—While many employers resent the restrictions imposed by Industrial Courts, directly or indirectly, and a much larger section of the employed are greatly disappointed because the Courts have not effected a complete solution of the whole problem of industrial amelioration, some thoughtful observers look upon Industrial Courts as a formal legislation of class warfare. As regards the last-mentioned, it is perhaps sufficient to say that both Civil and Criminal Law have been regarded at times, and with no less excuse or justification, as agencies or instrumentalities of class conflict. The class war *does* exist to-day, and frequently assumes catastrophic proportions. Industrial Courts do not create the war; they are essentially a means for coping with it in accordance with reasoned principles. As regards restrictions on employers in the conduct of their business, Industrial Courts, as a rule, are chary in imposing such conditions except when considerations of humanity or the social welfare justify the restrictions. In any case, the restrictions are, or may be made, of general application; and in so far as they are reasonable, they are in the interest of the employers as a whole, since all are put on the same basis, and the enlightened employer is not placed in a position of having to face the unfair competition of the unscrupulous employer, who regards his workers as a mere means to an end. The failure of Industrial Courts to solve the whole problem of industrial amelioration calls for more serious consideration. There has been throughout Australia generally a lack on the part of the general public, or on the part of public officials or private persons, to realise how dependent the efficient functioning of Industrial Courts is upon complementary agencies of social betterment. A conspicuous example is the general level of prices. If only in order to meet the increased cost of living, it has been necessary even in Australia to raise wages. The effect on the general level of prices has been, in my opinion, greater than can be justified. How far price-controlling authorities throughout the Commonwealth are responsible I do not presume to say; but it has been apparent that employers of labour have been far too ready to take the line of least resistance, and to pass on increased costs of production by enhancing the price of commodities without regard to the possibility of meeting the addition to the

wages bill by such means as increased initiative, enterprise, or managerial efficiency, etc. Of course, in Australia, competition prevails. We may have monopolies and combines; but even in fields where monopolies and combines cannot be supposed to exist, there seems to have been amongst employers a disposition to adopt the line of least resistance when wages are increased, and "pass it on." In other words, competition as a determinant of prices has been a very ineffectual guarantee of the interests of the consumer. This state of things may be transitional, but it is easy to understand why employers who have been long accustomed to a particular business organisation, or a particular dividend, when confronted with an increased wages bill, are naturally tempted to "take it out" of the consumer. At times they may be justified. But if the policy is adopted by employers generally, the result is a vicious cycle.

Other examples might be quoted of failure on the part of public or private persons to assist as agencies complementary to Industrial Courts in the great cause of social betterment. Governmental Institutes of Research, higher standards or methods of popular education, schemes of "Social Welfare," the development of the spirit of mutual aid between employer and employed (together with the institutions necessary to give effective expression to that spirit), more highly organised and efficient management of industry, the progressive elimination of waste—these are taken at random as examples of agencies of social betterment which no judicial tribunal for the regulation of industrial conditions can render dispensable. The disposition of the citizen to regard some new institution or some new form of social organisation as all-sufficing is invincible. Not by action along one line, but by action along many lines, can the aspirations of the patriotic citizen be realised. In proportion as this obvious fact is realised, the community will become increasingly conscious, at once, of the limitations and of the value and potentialities of Courts of Industrial Justice.

THE UNITED STATES SENATE AND THE TREATY-MAKING POWERS.

[*Contributed by* DONALD MACMASTER, ESQ., K.C., D.C.L., M.P.]

The Language of the Constitution.—"The Constitution of the United States of America is much the most important political instrument of modern times"—such was the dictum of Sir Henry Sumner Maine, no mean authority. Among others it contains the following clear and express provisions:

"1. He [The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur, etc.

"2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or law of any State to the contrary notwithstanding."

The Aims of the Founders.—It will be observed at once that the treaty-making power of the President and the Senate are co-equal in authority. If we refer to the debates that preceded and that followed the adoption of the Constitution, it is clear that the founders intended that the Senate, in addition to being a branch of the Legislature, should be also a check upon the authority of the President in negotiation of treaties, and for this purpose the design was clear that he should have the aid of advisers that were representative of the several States, each of the thirteen original States being entitled to select in their Legislatures two representatives to the United States Senate.[1] The Senate originally was a small body, twenty-six members in all, representative of the thirteen original States, and it would appear that the intention was that it should act, in so far as treaties are concerned and the nomination of officers of State to public places, very much as a Council of Advisers. The number of the States is

[1] The selection of Senators is now by direct vote of the people of each State (17th Amendment of the Constitution).

now forty-eight—and consequently the Senate is now composed of ninety-six members.

Mr. Jay (the *Federalist*, No. 74) says: "The Convention have done well in so disposing of the power of making treaties that, although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence will suggest."

And, speaking of treaty-making, Mr. Jay further observes: "Those matters which in negotiations shall require the most secrecy and the most despatch are those preparatory and auxiliary measures which are not otherwise important in a national view, as they tend to facilitate the attainment of the objects of the negotiations. For these the President will find difficulty to provide; and, should any circumstance occur which requires the advice or consent of the Senate, he may at any time convene them. Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, deliberate investigations on the one hand, and every secrecy and despatch on the other."

Speaking of the advice and consent of the Senate, Hamilton (*Federalist*, No. 75) says: "Though this provision has been assailed on different grounds with no small degree of vehemence, I simply have to declare my firm persuasion that it was one of the best-digested and most unexceptional parts of the plan. . . . I venture to add that the particular nature of the power in making treaties indicates a peculiar propriety in that union (of the Executive with the Senate). . . . It must indeed be clear to a demonstration that the joint position of the power in question by the President and Senate would afford a greater prospect of security than the separate possession of it by either of them."

Madison (*Federalist*, No. 42) observes: "The powers to make treaties, and to send and receive Ambassadors, bespeak their own propriety."

The Hon. John W. Davis, Ambassador of the United States, in an address[1] recently delivered before Oxford University British-American Club, referred to the language of the Constitution and said: "To understand the Constitution, it is necessary to bear in mind the circumstances and the atmosphere which surrounded the Convention

[1] Published by the Oxford University Press, 1*s*.

by which it was devised. That body met hot upon the close of the War of Independence. . . . They had suffered, as they believed, from a deliberate effort on the part of the Crown to enlarge its power and invade the domain of the elected representatives of the people, and they were determined that, having shaken off their allegiance to George III, they would set up no imitator in his stead."

The Words of the Wise.—Lord Bryce, commenting on the Senate, describes it as " This masterpiece of the Constitution-makers." [1] Referring to its powers, he says: " The necessity of ratification by the Senate in order to give effect to a treaty enables the country to retire from a doubtful bargain, though in a way which other Powers find disagreeable, as England did when the Senate rejected the Reverdy Johnson Treaty of 1869. . . . The Senate may and occasionally does amend a treaty, and returns it amended to the President. There is nothing to prevent it from presenting a draft treaty to him, or asking him to prepare one; but this is not the practice." [2]

Lord Bryce, in a Summary of Hamilton's Letters and Elliot's Debates, states that one aim of the founders was " to create a Council, qualified by its moderate size, and experience of its members, to advise and check the President in the exercise of his powers of appointing to office and concluding treaties." [3]

Lord Bryce, than whom there is no higher authority on the American Commonwealth, published the new edition in 1910.

In the following year Dr. Woodrow Wilson, then President of Princeton College, published his book entitled *Constitutional Government in the United States*. His comments are so apposite and relevant in amplification of the subject under discussion that, in fairness to him, I quote them at length.

" When we turn to the question which is the central question of our whole study, the question of the co-ordination of the Senate with the other organs of the Government and the synthesis of authority and power for common action, it at once becomes evident that such a body as I have described the Senate to be must be very hard indeed to digest into any system. A co-ordination of wills, united movement under a common leadership, is of the very essence of every efficient form of government. The Senate has a very stiff will of its own, a pride of independent judgment very admirable in

[1] *American Commonwealth*, New Ed. 1910, vol. i, p. 114.
[2] *Ibid.* vol. i, p. 109. [3] Vol. i, p. 113.

itself, but not calculated to dispose it to prompt accommodation when it differs in its views and objects from the House or the President. . . .

"The formality and stiffness, the attitude as if of rivalry and mutual distrust, which have marked the dealings of the President with the Senate, have shown a tendency to increase rather than to decrease as the years have gone by, and have undoubtedly at times very seriously embarrassed the action of the Government in many difficult and important matters.

"The Senate has shown itself particularly stiff and jealous in insisting upon exercising judgment upon foreign affairs, and has done so so often that a sort of customary *modus vivendi* has grown up between the President and the Senate, as of rival powers. The Senate is expected, in most instances, to accept the President's appointments to office, and the President is expected to be very tolerant of the Senate's rejection of treaties, proposing, but by no means disposing, even in this chief field of his power. Advisers who are entirely independent of the official advised are in a position to be, not his advisers, but his masters; and when, as sometimes happens, the Senate is of one political party and the President of the other, its dictation may be based, not upon the merits of the question involved, but upon party antagonisms and calculations of advantage.

"The President has not the same recourse when blocked by the Senate that he has when opposed by the House. When the House declines his counsel he may appeal to the nation, and, if public opinion respond to his appeal, the House may grow thoughtful of the next congressional elections and yield; but the Senate is not so immediately sensitive to opinion, and is apt to grow, if anything, more stiff if pressure of that kind is brought to bear upon it.

"But there is another course which the President may follow, and which one or two Presidents of unusual political sagacity have followed, with the satisfactory results that were to have been expected. He may himself be less stiff and offish, may himself act in the true spirit of the Constitution and establish intimate relations of confidence with the Senate on his own initiative, not carrying his plans to completion and then laying them in final form before the Senate to be accepted or rejected, but keeping himself in confidential communication with the leaders of the Senate while his plans are in course, when their advice will be of service to him and his informa-

tion of the greatest service to them, in order that there may be veritable counsel and a real accommodation of views instead of a final challenge and contest. The policy which has made rivals of the President and Senate has shown itself in the President as often as in the Senate, and if the Constitution did indeed intend that the Senate should in such matters be an executive council it is not only the privilege of the President to treat it as such, it is also his best policy and his plain duty. As it is now, the President and Senate are apt to deal with each other with the formality and punctilio of powers united by no common tie except the vague common tie of public interest; but it is within their choice to change the whole temper of affairs in such matters and to exhibit the true spirit of the Constitution by coming into intimate relations of mutual confidence by a change of attitude which can perhaps be effected more easily upon the initiative of the President than upon the initiative of the Senate.

"It is manifestly the duty of statesmen, with whatever branch of the Government they may be associated, to study in a very serious spirit of public service the right accommodation of parts in this complex system of ours, the accommodation which will give the Government its best force and synthesis in the face of the different counsels and perplexing tasks of regulation with which it is face to face, and no one can play the leading part in such a matter with more influence or propriety than the President. If he have character, modesty, devotion, and insight as well as force, he can bring the contending elements of the system together into a great and efficient body of common counsel."

In 1913 Mr. Elihu Root, the great American lawyer and statesman, published two lectures in a little book entitled *Experiments in Government and the Essentials in the Constitution*. I refer to it because he comments upon the only obscurity in the American Constitution. These are his words: "Nothing has involved more constant discussion in our political history than questions of conflicts between these two Powers (State and National), and we fought the great Civil War to determine the question whether, in case of conflict, allegiance to the State, or allegiance to the Nation, was of superior obligation. We should observe that the Civil War arose because the Constitution did not show a clear line between the National and State powers regarding slavery." [1]

[1] Reprinted in *Addresses on Government and Citizenship*, p. 105.

Apart from that obscurity, the Constitution is a model of clarity and conciseness of expression. As to the meanings of the two clauses now under consideration there really can be no difference of opinion. To use a hackneyed phrase, we have only to apply the principles of "self-determination" to them, and all difficulty disappears. There can be no treaty without the joint acts of the President and the Senate. Upon the question of construction nothing can be usefully added. And there need be no sacrifice of dignity, as the powers are co-equal, in suggestion or concession coming from one side—or the other. It is a principle with us that "the King's government must be carried on"—and the preamble to the American Constitution makes it clear that "The people of the United States" expect that the power conferred by them—shall be exercised in the manner directed in the Constitution which they "ordained and established."

Commenting upon the "machinery" of the Constitution, Mr. Davis, in the address referred to, said: "I would have you understand that, in the formation of a treaty valid and binding upon the United States, there are three distinct and indispensable stages: there are first negotiation by the President; second, approval by the Senate; and third—and this by no means a mere form—ratification by the President." And he points out that, in respect of approval, "The Senate has at various times (1) approved unconditionally, (2) approved with amendments, (3) approved without express amendments but upon condition that certain changes should be made, (4) approved with an accompanying resolution of reservation or interrelation, (5) failed to approve or act, and so permitted the treaty to die an unnatural death, or (6) disapproved and rejected."

Finally, Mr. Davis points out that the President—even if the treaty has survived its ordeal in the Senate—may refuse to exchange ratification of it with the other contracting Power, and may "decide to proceed no further with the advice and consent which the Senate has expressed." And Mr. Davis adds: "This is true as well when the action of the Senate is one of unanimous approval as when it is one of grudging consent or mutilated amendments."

Precedents.—I will conclude these observations by citing some precedents, though the list is by no means exhaustive.

As recently as 1884 President Arthur asked for the advice of the Senate in regard to a reciprocity treaty with Hawaii, as he

considered " it fitting to consult the Senate on the matter before directing negotiations to proceed."

In 1874 President Grant submitted to the Senate a draft treaty with Canada, and asked for its " constitutional concurrence to the conclusion of a treaty with Great Britain . . . either in such form as is proposed by the British plenipotentiaries or in such other acceptable form as the Senate may prefer."

In 1873 President Grant asked this Senate for " counsel in advance " in regard to a proposition of Great Britain to adjust differences in connexion with the Geneva Convention.

In 1862 President Lincoln referred " to the Senate for its advice " a proposed treaty with Mexico. The Senate advised against it.

In 1861 President Buchanan asked the Senate whether it would approve of the proposal of the British Government to arbitrate on international boundaries, stating that " before accepting this proposition I have thought it wise to take advice of the Senate."

The Oregon boundary dispute which brought this country and the United States to the verge of war was adjusted in 1846 by President Polk submitting to the Senate the British proposal, for its " consideration and advice," adding that he would " conform " his action " to their advice."

In 1818 President Monroe asked the Senate to advise him whether he could make an agreement with Great Britain restricting armaments on the Great Lakes separating the United States from Canada, and, in case they thought he could not, he asked them to " advise and consent to an agreement." The Senate consented.

President Washington consulted the Senate in regard to treaties even before negotiations commenced—in 1790 in making a treaty with the Indians and in 1792 in making a treaty with Algiers for the ransom of American captives.

It may be suggested that the exercise of the treaty-making power presupposes that the President and the Senators have convenient access to each other, for consultation and conference, during the period of negotiation—though the Constitution does not so provide.

The machinery of the treaty-making power is indeed complicated —at times inconvenient and not readily understandable by other nations; but, as Mr. Davis remarks, " On the whole the scheme of the fathers has served the children well."

THE IMPERIAL CROWN AND THE FOREIGN RELATIONS OF THE DOMINIONS.[1]

[*Contributed by* H. DUNCAN HALL, ESQ., M.A., B.LITT.]

THE extent to which great changes have taken place in the relations between the United Kingdom and the Dominions in the last three years is beginning to be realised in the Dominions, but has received little attention in the United Kingdom. There is a vague idea that these changes have practically completed the conversion of the British Empire from a single State, with a number of dependent communities attached to it, into a group of autonomous States, equal in status though not in stature. But there is little general knowledge of the great constitutional developments which this process has involved, or of the problems which it has laid bare. Although the special constitutional Imperial Conference is now close at hand, the problem of Dominion status, the most difficult of all the problems involved in the "readjustment of the constitutional relation of the component parts of the Empire," is not only unsolved but awaits the first essential of a solution, namely, clear statement. A full treatment of the problem of Dominion status would involve a discussion ranging over the whole field of government—executive, legislative, and judicial. The aim of this article is, not to attempt any such exhaustive treatment, but to direct attention to the core of the problem—namely, the position of the Dominions in respect of foreign relations.

The Demand for Absolute Equality of Status.—Neither in the Constitutional Resolution passed by the Imperial War Conference of 1917, nor in the debate on this resolution, was absolute equality of status with the United Kingdom demanded by the Dominions.

[1] The subject of this article has been dealt with several times in the Journal, notably in an article from the Canadian point of view by Sir Hibbert Tupper (*Journal*, vol. xvii, p. 5). The present contributor (an Australian) has published the results of his studies in a volume entitled *The British Commonwealth of Nations* (Methuen).

Sir Robert Borden spoke of a development in the future along the "lines of an increasingly equal status . . ."; and General Smuts expressed the view that equality would have to be recognised "to a very large extent." [1] But so rapidly did the desire for equality of nationhood grow in the Dominions that by 1919 the hesitation indicated by these phrases had gone completely, and Dominion statesmen seized every opportunity to emphasise the necessity of recognising the "absolute equality" of the Dominions with the Mother-country. Moreover, they struggled persistently and successfully to secure the international recognition of this principle, on every possible occasion during the making of peace and the resettlement of the world's affairs from 1918 onwards.

The Treaty Debates of September 1919 in the Dominions Parliaments have given the latest and most striking indication of the importance attached by the Dominions to the recognition of the principle of equality of nationhood. In the Canadian Debate every Minister who spoke repeatedly emphasised the principle, and the fact of its international recognition. In the Union House General Smuts spoke in the same strain. ". . . We have received," he said, "a position of absolute equality and freedom, not only among the other States of the Empire, but among the other nations of the world." [2] Like the Canadian Ministers, he went on to emphasise that this absolute equality included equality as regards foreign relations as well as regards domestic concerns. "In future," he said, "the Dominions would, in regard to foreign affairs, deal through their own representatives." [3]

Taken by themselves, and out of their context, these emphatic assertions of "absolute equality" would appear to imply nothing less than Declarations of Independence by the Dominions, and the formal disruption of the Empire. But beside these emphatic declarations of independence must be set equally emphatic, but seemingly incompatible, declarations of imperial unity. The Dominion statesmen in Paris, said General Smuts, kept two things steadily before their eyes. They were anxious to secure "international recognition of their status among the nations of the world; but we were equally anxious to see that nothing was done which would loosen the ties which bind together the British Empire." [4]

[1] *Proceedings of Imperial War Conference of* 1917, pp. 41 and 47.
[2] Speech in Union House, Sept. 10, 1919. [3] *Ibid.* [4] *Ibid*, Sept. 9th.

The Problem of Dominion Status.—These apparently incompatible declarations, when placed side by side, reveal the crux of the problem of Dominion status. How is it possible to reconcile the absolute equality of status demanded by the Dominions with the maintenance of the formal unity of the Empire? Can the Dominions secure legislative, executive, and judicial equality with the United Kingdom, including treaty-making powers, diplomatic representation and so forth, without bringing about at once the formal disruption of the Empire into its constituent States? To this question no responsible statesman has yet given a definite answer. Equality of nationhood has been asserted at every available opportunity by Dominion statesmen, but they have not shown that they have in mind any rational unifying principle by the application of which Dominion autonomy and Imperial unity may be finally reconciled.

A General Declaration of Constitutional Right.—I have suggested elsewhere that such a unifying principle is revealed in the history [1] of inter-Imperial relations since the grant of responsible government. Dominion autonomy and imperial unity have been reconciled by the application of a principle well known to the British Constitution, namely, the distinction between *legal right* and *constitutional right*. By developing this distinction to its logical conclusion it is possible, without destroying the legal unity of the Empire, to secure to the Dominions the absolute equality of nationhood which they desire. The formal unity of the Empire depends on the *legal right* possessed by the Imperial Crown and by the Imperial Parliament in every portion of the Empire. The development of the Dominions towards independence has in no wise destroyed this legal authority; nor will it be destroyed by a general declaration on the part of the Dominions of their constitutional independence and equality with the Mother-country. The gradual transformation of the British Empire from a single State into a group of equal and autonomous States has been brought about by the restriction or fencing in, point by point, of the legal power of the United Kingdom over the Dominions (*e.g.* as regards tariffs, immigration, etc.) by means of successive declarations of constitutional right—declarations which have been made by the Dominions and have been supplemented where necessary by the British Parliament. What now seems to be required to secure to the Dominions complete constitutional equality

[1] *The British Commonwealth of Nations*, chap. ix.

with the United Kingdom is the rounding off of these particular declarations by a *general declaration of constitutional right* which would cover the whole field of government—executive, legislative, and judicial. Such a general declaration might be drawn up in the form of a series of resolutions of the Imperial Conference. Its effect would be to destroy the last vestiges of the constitutional superiority of the United Kingdom over the Dominions, whilst at the same time it would preserve the *legal* sovereignty of the British Parliament and the legal unity of the Imperial Crown in respect, especially, of foreign relations—the two things which together constitute the formal unity of the Empire. The declaration would require to be implemented in certain respects by imperial legislation (*e.g.* to make the legislative powers of Dominion Parliaments equal to those of the British Parliament, by means of amendments of the Dominion constitutions). But it would do its work mainly by establishing new conventions of the Constitution, or by giving authoritative expression to conventions which are already in existence; and this is especially true in respect of foreign relations.

The Imperial Crown.—All that is really required to give the Dominions absolute equality with the Mother-country in respect of foreign affairs is the drawing out from recent experience, and the authoritative statement of, several new conventions of the Constitution. These conventions hinge upon the existence of the Imperial Crown, and it is therefore necessary to examine briefly the position of this institution.

At a moment when Republicanism is steadily overthrowing the thrones of Europe, the British Monarchy not only stands firm, but actually seems to increase in prestige. But it is not really the British Monarchy which is increasing in prestige; left to itself it might not have survived more than another generation. What is increasing in prestige is the Imperial Crown, an institution from which the British Monarchy is quite distinct in theory, but with the fortunes of which it is indissolubly united, by reason of the fact that the two institutions meet together in the body of a single person.

The position of the Crown as a great bond uniting a society of free republics is, indeed, one of the most remarkable features of modern times. From this point of view the really vital factor in the situation is not so much the attitude taken to the Crown by the people of England or of the dependencies, but rather the

attitude taken by the leaders of the overseas democracies. The obviously sincere tributes which have been paid by these leaders time after time in recent years, and especially at the Imperial War Conference of 1917, to the value of the Crown as a bond of union, have revealed a feeling which goes beyond the customary formality of the loyal resolution passed by each Imperial Conference. This feeling was indicated most clearly in the speech in which General Smuts in 1917 somewhat startled public opinion in England by offering what was perhaps the most glowing tribute yet paid to the value of the "hereditary kingship" as a means of keeping the Empire together. "You cannot," he said, "make a Republic of the British Commonwealth of Nations, because, if you have to elect a President not only in these islands, but all over the British Empire, who will be the ruler and representative of all these peoples, you are facing an absolutely insoluble problem." [1] These were weighty words, but in 1917 their full significance had not yet been revealed. It was not revealed until the constitutional developments of the Peace Conference period, and the enunciation by the Dominion Prime Ministers of a new doctrine of the position of the Crown in relation to the Dominions, suddenly illuminated the whole situation. The doctrine ran as follows: "The Crown is the supreme Executive in the United Kingdom and all the Dominions, but it acts on the advice of different Ministries within different constitutional units." [2]

The Doctrine of the Equality of the Dominions in Respect of the Crown.—This doctrine was not altogether new: it was, indeed, enunciated by Sir Robert Borden in 1917,[3] and it can be traced back at least as far as the debate on the constitutional resolution at the Colonial Conference of 1907, in which Sir Wilfrid Laurier, objecting to the monopoly by the United Kingdom of the phrase "His Majesty's Government," said, "We all claim to be His Majesty's Government." What was new and decisive in 1919 was the application of the doctrine. In order to understand the significance of this application we must glance at the constitutional position of the Imperial Crown in respect of foreign policy. The vital factor in the situation is the concentration in the Imperial Crown of the legal powers necessary

[1] Speech, May 15, 1917.

[2] Memorandum circulated on behalf of Dominion Prime Ministers by Sir Robert Borden to British Empire Delegation in Paris, March 12, 1919. Published in *Sessional Paper*, 41 *j*, 1919 (Canada).

[3] *Proceedings of Imperial War Conference of* 1917, p. 59.

for formal action in respect of the relations of the Empire or its component parts with foreign States. As the position stands at present, the Dominions, in order to enter into formal relations of any kind with foreign Powers (*e.g.* formal negotiations of any sort, the conclusion of any kind of treaty or convention—as distinguished from an informal agreement—the appointment of diplomatic agents, the appointment of Dominion plenipotentiaries in international conferences) must have access to, or be able to make use of, the sovereign powers which remain vested formally in the Imperial Crown. If the principle of absolute equality of nationhood is to mean anything the Dominions must have free access to these sovereign powers.

The most obvious method whereby the Dominions could secure such free access would be by the formal devolution of these powers upon the King's Viceroys, the Governor-Generals. But this would involve the formal disruption of the Empire into a number of sovereign States, which would be separate units in international law, though they might choose to remain bound to the parent State by the purely personal tie of the common Monarchy. A solution along these lines runs counter to the deeply rooted feelings of the self-governing peoples of the Empire that the formal unity of the Empire is worth preserving, and that the equality of status which the Dominions desire can be achieved without destroying this unity. It was in obedience to this feeling that the Dominions Prime Ministers, when confronted with the problem of applying the doctrine of equality of nationhood to particular issues, such as the negotiation and ratification of the Peace Treaty, invented a new procedure whereby on these particular occasions the Dominions secured access, on a basis of equality with the United Kingdom, to the sovereign powers in respect of foreign relations which remain vested in the Imperial Crown.

New Constitutional Practices.—This procedure is clearly of the utmost importance because it establishes a precedent and points the way to a general method whereby equality of nationhood in respect of foreign relations may be secured without destroying the formal unity of the Empire. The procedure may best be studied in the example of the ratification of the Peace Treaty. In the Memorandum already referred to, the Dominion Prime Ministers had insisted that, in accordance with the principle of equality of

nationhood, clauses should be inserted in the Peace Treaty which would have the " effect of reserving to the Dominion Governments and Legislatures the same power of review as is provided in the case of other contracting parties." When the time came, the Dominion Governments, led by Canada, insisted upon exercising this power with all due formality, despite the reluctance of Lord Milner, though the Colonial Secretary admitted that " for a treaty of this far-reaching importance, and one embracing the whole Empire, the King certainly ought only to act at the instance of all his constitutional advisers—the Dominion Ministries as well as that of the United Kingdom " ; but he went on to suggest to the Canadian Government that " in the case of the Dominions the signature of the Dominion plenipotentiaries is equivalent to the tendering of advice to ratify "—a contention which that Government refused to accept. It submitted the treaty to the Canadian Parliament (as did all the Dominion Governments to their respective Parliaments), and, having secured approval, passed a formal Order in Council advising the Crown to ratify the treaty " for and in respect of the Dominion of Canada." [1]

Before attempting to interpret the significance of this procedure, reference must be made to a more recent example of the application of the doctrine of equality of nationhood in respect of foreign affairs. I refer to the announcement with regard to the appointment of a Canadian Ambassador at Washington. The appointment, it was announced, would be made by His Majesty " *on the advice of his Canadian Ministers.*" [2] It will be noted that the procedure indicated here differs in one vital respect from the procedure in respect of ratification. In the case of ratification the Dominion Governments insisted, and the British Government recognised, that in such a matter, " *embracing the whole Empire,* the King certainly ought only to act *at the instance of all his constitutional advisers*—the Dominion Ministries as well as that of the United Kingdom." Whereas in the case of the appointment of an Ambassador, the advice of the Dominion concerned was regarded as sufficient.

The Distinction between "Group" and "National" Questions.—The significance of this difference in procedure is fairly clear. Both the examples referred to have a background of history. The pro-

[1] The Order in Council, the correspondence with Lord Milner, and other important documents were published in the Canadian *Sessional Paper,* 41 *j.* (1919).

[2] *Hansard* May, 10, 1920.

cedure adopted with regard to ratification takes us back at least as far as the establishment of the Imperial War Cabinet in 1917. Referring to this Conference of Governments, Sir Robert Borden said: "The Crown at present acts upon the advice of a Cabinet in all Imperial matters, which includes not only Ministers responsible to the British Parliament, but also those responsible to the Parliaments and Governments of the respective Dominions . . ." [1]

The second example takes us back much farther. It represents a more formal development of the practice adopted with regard to certain questions of foreign relations—*e.g.* commercial treaties, immigration agreements and so forth—which long before the war were recognised to be within the competence of the Dominions, and in respect of which the Imperial Crown acted upon the advice of Dominion Ministers, though the action was of course taken formally through the British Ministry as the immediate advisers of the Crown.

What has in fact been happening is the growth of a distinction between two kinds of foreign relations. The first of these may be called *group* matters, *i.e.* matters embracing the whole Empire, and especially questions which immediately involve the issues of peace and war, *e.g.* declarations of war, the negotiation of peace treaties and of other important political treaties. Questions of this kind have been distinguished from what we may call *national* matters, *i.e.* questions which mainly concern a single State, and do not directly affect the group as such—examples being trade relations (including tariffs and commercial treaties), migration (including treaties and agreements in respect of this), the appointment of diplomatic agents, etc.

The Growth of New Conventions of the Constitution.—The essential character of *group* questions is that action by the Crown in such matters cannot be taken for one member of the group of States without necessarily involving the others. Until recently such actions have been taken by the Crown solely upon the advice of the British Government, and although in many cases the Dominions have been consulted and have given their consent, in some of the most important of all they have been involved without consultation. The effect of the constitutional developments from 1917 onwards has been to introduce the new constitutional practice that the Crown should not take action in any vital matter of high policy

[1] *Proceedings of Imperial War Conference*, 1917, p. 59.

involving each part of the Empire unless advised thereto by all the responsible Governments of the group of States. This constitutional practice has now worn a channel sufficiently deep to create a new convention of the constitution—that no one member of the group of States has the constitutional right to advise the Crown in respect of vital questions of high policy involving the whole Empire unless the other members concur in the advice. It is, of course, difficult to say at what stage in its growth a constitutional practice hardens into a convention of the Constitution. Much depends on the power of the observer to appreciate the direction in which events are moving, and upon whether or not his estimate of the importance of certain precedents is correct. But the vital factor is the attitude taken with regard to these precedents by the peoples and statesmen concerned. A study of the speeches and pronouncements of British and Dominion statesmen, especially in the Treaty debates in the Dominion Parliaments, should leave little doubt that in the case under consideration a convention of the Constitution is firmly established. Any doubt on the matter would be removed by an authoritative pronouncement on the subject by the Imperial Conference.

As regards *national* matters it seems equally clear that a convention of the Constitution is growing up whereby the Dominions can secure for the purpose of their foreign policies the necessary access to the sovereign powers concentrated in the Imperial Crown. As the example of the Canadian Ambassador shows, there is now in existence a convention or understanding that, in respect of *national* matters, the Crown shall act on the advice and responsibility of the Ministry of the Dominion concerned. A difficulty arises from the fact that, so long as the Imperial Crown and the British Crown remain united in the body of a single person, the Dominions cannot in practice be given direct access to the Imperial Crown, except at the risk of aggrandising the power of the King. This difficulty may be overcome by the formulation by the Dominions of a second convention—already foreshadowed in the declarations of the Canadian Ministry—which might be stated as follows: While the British Ministry must of necessity remain the channel through which Dominion Ministries advise the Imperial Crown in respect of national matters, and through which that Crown grants the necessary powers to Dominion Ministers to take formal action in such matters, the

British Ministry shall no longer possess the *constitutional right* to close or to restrict that channel.

Conclusion.—It is not the purpose of this article to attempt to pass judgment upon the unique type of political organisation revealed in this summary analysis. Through lack of space many difficulties—such as, for example, those arising out of the close relationship which exists between *group* and *national* questions, the machinery of co-operation necessary to work a system of the kind indicated, the relations between the British group of States and the all-inclusive League of Nations—must be left untouched. All that can be said, in conclusion, is that a system of this kind offers a possible *via media* between formal dissolution and an imperial federal Super-State based on the principle of majority rule. To tread firmly in this middle road, to work a system which assumes the possibility of unanimity amongst the members of the group of States on crucial questions of foreign policy involving formal action by the Imperial Crown—will require great goodwill, great forbearance, and great political sagacity. These qualities exist—whether in sufficient strength the future alone can tell. But, whatever is to be the outcome, it is clear that the experiment must at least be tried.

A NEW BASIS FOR INDUSTRIAL CORPORATIONS.

[*Contributed by* G. R. STIRLING TAYLOR, ESQ.]

The Immediate Industrial Problem.—The modern industrial system based, in the main, on a triple foundation of capital, labour, and free competition, shows very grave signs of cracking. We have reached a crisis when disagreement between the capitalists paying wages and the workers receiving them has become so permanent and bitter that it can almost be described as a state of industrial civil war. In a less developed society, more or less chronic war, whether of a military or economic kind, is not altogether incompatible with a fairly stable community. It was possible, for example, for England and France to fight the Hundred Years' War without destroying their civilisation. But to-day, with more complicated social machinery, such a condition of affairs is impossible. We have just seen that a war of four years has almost shaken European civilisation to pieces. We are now faced by signs of a still more shattering industrial war, of which it is impossible to conceive a long continuance without disastrous results. If our civilisation is to continue it is necessary for the industrial machine to work smoothly, for it is the main material factor of our present social system.

It is the object of this article to consider the subject with the strict impartiality of the physician searching for a possible cure, without weighing the moral factors involved in the dispute. This article will not consider whether the masters or the men have justice on their side; it is purely concerned with the practical necessity of discovering how the work of the world can go on; and more particularly it seeks to discover whether there is any legal reconstruction which is a necessary part in a remedy.

The Problem Analysed.—The situation is not peculiar to this country; it is common, almost in its details, to all the modern world which has developed a complex industrial system. It is an age of internationalism in politics, in finance, in industry. The highly

specialised factory, the workshop, the trust magnate, the trade unions, the problems of over-production and unemployment, the strike and the lock-out, are all common to the great modern States. The student of industrial sociology will find nothing very fundamentally new after he has grasped the factors of the problem in one of the great nations. Some of the details may differ, but the main causes of industrial unrest are unfortunately only too cosmopolitan. Nevertheless, although the main causes may be the same almost everywhere, yet there is already a distinction in the remedies which are being applied in different countries: a fact which gives the discussion a very necessary place in this Journal. For example, France and Italy have put into legal form new ideas which have not yet reached the British Statute-book. Perhaps because she has been through a tempestuous political revolution at the end of the eighteenth century, with such inadequate social results (in the sense of constructive reform), France is less beguiled than we are by political schemes. It is probably for such a reason that we find the recent French Acts of 1917 and 1920, which are almost a new departure in economic principles, and, in the former case, incidentally a new departure in company law. Then again, Italy, which quite suddenly became a modern industrial nation in the last half-century, has never entirely lost that communal sense which was the distinguishing mark of the Middle Ages. Therefore, we find the Italian Government already encouraging the revival of that older system, by legal concessions to the labour co-operative societies which we cannot find in our country, where the mediæval guilds were almost finally destroyed in the age of the Tudors.

The Factors of the Unrest.—A careful study of the symptoms of the industrial disease will reveal two main characters. There is, first, a demand by labour for a greater share in the profits; secondly, there is the claim that the workers shall have a definite share in the management. Perhaps the second is the more fundamental and the newer demand of the two. Taken together, the two amount to the radical request that Labour shall share with Capital the profits and management which have, during the last two hundred years, at least, been regarded as, in the main, the possession and function of Capital alone. Of course, there has long been a movement towards profit-sharing, and also in the direction of co-management, in a smaller degree; while the greater part of the so-called social reform

legislation has been an infringement on the sole claim of Capital to the profits and managing control. But it is only burying one's head in the sand not to recognise that the present demand of Labour is almost a change in substance rather than of degree; for it is nothing less than an assertion of the right and necessity of Labour being the predominant partner in industry. That does not necessarily mean the attempt to abolish the whole share of Capital, but it does mean an attempt to readjust the balance both of profits and management in a very radical manner. It is important to note at once that this is not by any means a purely class demand, for, as we shall see later, "Labour" (as against "Capital") includes the whole managing and scientific and clerical staff of an industry; indeed, for our present discussion, it includes everyone engaged in industry, except the sleeping partner or passive shareholder.

The Legal and Economic Position of Capital.—Since at least the beginning of the Industrial Revolution, say 1780, Capital has been the controlling element in industry and agriculture. There had been a time when the individual worker had counted almost as a self-contained unit, although functioning within the social machinery of the guilds or of the later "domestic" industry. These gave place to the capitalist master; and, later, to the limited liability company. In the corporations registered under the Companies Acts modern industry has reached its present extreme position. It is not an exaggeration to say that the Companies Acts are the foundation of the capitalist system. It scarcely seems possible that this system could have developed to its present strength without a firm legal basis of the kind give in these statutes; and it is particularly necessary to note their position and effect here, because it will be suggested later that there is little chance of industrial rest until Labour is offered some such similar protection as the Companies Acts offer to Capital. The essential feature of these statutes is that they enable those possessing capital (which they can lend, or invest) to take part in industrial developments without necessarily taking part in the labour or the control. Of course, a shareholder may be also director or a manager, or a manual worker, in which case he will be both on the Capital and Labour side of the account; but it is only on the former that we have to consider him for the moment. The essence of the shareholder, *qua* shareholder, is that he lends his money and nothing more. The supreme advantage of the Companies Acts to

Capital is that this loan can be made on the basis of a strictly limited risk (namely the amount of the share) while unlimited profits can be earned in return for that loan. The share of labour (whether managerial or manual) is limited to salary or wages; which, once paid, leaves the whole surplus to increase the dividends of the non-working shareholders. To repeat, the Companies Acts are, in the main, drafted in defence of the interests of those who have surplus wealth to invest, on which its possessors can draw dividends without personally taking a part in the process of earning that interest. If there are moral imputations of injustice in this statement, it applies equally to the hard-working typist who has invested the savings of a life-time in a factory to provide a pension for old age, and to the millionaire who buys its shares on the Stock Exchange, and may not even know its geographical position.

The Shareholders *v.* **The Employees.**—As a result of the Companies Acts (so far as a statute can control the economic situation), the shareholding capitalists have undoubtedly a controlling grip over industrial profits. The present labour unrest is very largely the result of the belief of the workers that they are allowing the shareholders to take an altogether undue portion. What else could the impartial observer imagine would be the effect of the following sentence taken at random from a general manager's statement at the annual meeting of a great company? "Twenty years ago you were receiving on your shares a dividend of 12*s*. These shares are now to be split—multiplied by five times—and on each of those new shares you will be receiving a dividend of 12*s*. That is not the result of any magic or miracle or of one brilliant year, but a steady, unwearied toil" (*The Economist*, May 8, 1920, p. 973). It is impossible for the employees of that company to resist the thought that it may be the result of their toil, and not of the shareholders. In the same number of the same Journal (pp. 958–9) there is a statement of the profits of the big London Retail Stores. Out of a list of fourteen companies, twelve paid last year 14 per cent. and over on their capital, five of these reaching 20 per cent., and a sixth paid 350 per cent. The public announcements of share profits in many of the great manufacturing firms are of a similar or even more striking kind. It is repeated that the question of justice is not raised here; especially when in probably a majority of the cases the shares have changed hands, and are now held at a price which brings

them all down to the more or less level standard current interest rate of the moment.

Labour and Management.—The claim of Labour to a definite share in the management (quite beyond any right of making suggestions, or possessing a small minority at the shareholders' meeting, or even a representative on the directorate lists) might seem at first glance more a matter of personal dignity, or even of sentiment, compared with the demand for a larger share in the profits. But it is something much deeper than that. It is not merely a vulgar desire to be masters of the situation rather than somebody else. It is at root based on the conviction that the workers in a trade are likely to arrive at sounder decisions on management than those which at present emerge from the decisions of shareholders' meetings, where the choice of directors may easily result in the election of a group of amateurs. The argument, it will be noted, applies equally, or even more, against the claims of the State Socialists for nationalisation under a bureaucracy, which would be probably worse than a meeting of shareholders in selecting a management. It is even less valid against the private master who is managing the business which he has himself erected; for, he *prima facie*, does at least know his work. But we are not discussing here the validity of the claim; we are only concerned with the fact that it does exist, and that it is a very large factor in the present labour unrest.

It is very pertinent, in seeking a solution, to remember that this claim in its present form is very largely the result of the teaching of the new guild theory, now so prominent, which is the outcome of the historical fact that for a long period of industrial development the self-governing guild was the managing factor in trade and production, as against both the modern private masters or directors, and the still more modern companies, or Socialist or bureaucratic State. The modern co-partnership experiments are a concession to this theory, just as the profit-sharing schemes are considered a concession to the theory of more equal division of profits. It is now necessary to consider whether the remedies of Co-operative Co-partnership and Profit-sharing, already in practice, show any signs of being a sufficient cure for the social disease. It is not necessary to argue the case for them on the somewhat unsatisfactory basis of theory, for they have been put in practice, and they can be judged by results.

The Remedies of Co-operation.—It is necessary to remember that Co-operation started with the ambitious intention of supplanting the system of private Capitalism by substituting a communal practice in production and exchange. It aimed at nothing less than the erection of the Co-operative Commonwealth. The co-operative societies have, throughout the world, attained a huge size. In Great Britain the Co-operative Wholesale Society has a capital of about £12,000,000, and a yearly trade reaching £80,000,000; it itself produced last year goods to the value of £23,000,000; it owns 13,000 acres of tea plantations; and its bank had a turnover last year of £243,000,000 (Miss Llewellyn Davies, in a report to the International Economic Conference, November 1919, p. 106; the Swarthmore Press, 1920). The same Conference was informed by Mr. Morosoff (*ibid.* p. 115) that the All-Russian Central Union of Consumers' Societies in 1919 comprised "307 unions and 20 societies with over 10,000 members in each," representing 30,000 smaller co-operative units, serving in all about 50,000,000 people, in some districts its members representing 75 per cent. of the population. In Germany there are (1919) 30,320 agricultural co-operative societies, and even in the disturbed year of 1918 they increased by 864 (*International Review of Agric. Econ.*, Jan. 1920). With such facts before us, considering the unrest in England, and the chaos in Russia and Germany, it is, *prima facie*, hard to believe that co-operation has found a substantial remedy for social unrest. Admitting its high ideals, the reason of its practical failure is not far to seek. Industry is first a problem of production, of which consumption is the natural, though secondary, sequence. The co-operative movement has tended to put consumption first; and it is now mainly a society of consumers who have agreed to share the surplus profits amongst themselves in the form of bonuses. In other words, any profits on the sales are returned to the buyers as bonuses, in proportion to their purchases; that is, they buy eventually at cost price. The wage and salaried servants (the producers) employed are ignored, indeed almost as much as they are in capitalist industry. The English and Scottish Wholesale Societies have even abolished profit-sharing in their productive establishments. The English Society only admits registered societies as members, and shares its surplus profits with these as buyers; the Scottish Society admits individuals, but only 675 out of a total of 8,784 employees

are shareholders, and as such entitled to a share of profits. Of forty-seven other consumers' productive societies, producing for retail co-operative stores, only three have profit-sharing schemes for their workers. There are also seventy-six co-operative productive societies that primarily are conducted for the benefit of the workers engaged (in distinction from the primary object of supplying retail stores), and therefore essentially profit-sharing organisations; but there has been a persistent decline in their number since 1904. The main feature of these last is that the interest payable on share capital is a fixed amount, the rest of the profits being distributed to purchasers of their products (following the general co-operative system noted above), after deducting bonuses for the employees, paid either in shares or in cash, these shares of course carrying a voting power in the meetings of the society. (For further details see the official report of the Labour Ministry on "Profit-sharing and Labour Co-partnership in the United Kingdom," Cmd. 544, H.M. Stationery Office.) Judged by the results, it is fairly clear that co-operation has not proved a drastic cure for social unrest. It is not difficult to find the reason of this failure; co-operation has failed to satisfy the labour demands for an adequate share in the profits and management. There is one principle followed by the co-operative societies which is certainly a contribution to a new industrial system, namely, the limiting of interest on shareholders' capital to 5 per cent. The significance of this will appear later. Further, the co-operative societies have succeeded in reducing loan capital to a minimum. "It is not an uncommon thing for a Society to do a trade of as much as £20,000 a year with a paid-up share capital of say £1,000, which with the rate of interest limited to 5 per cent., would absorb only £50." (See *Co-operation in Many Lands*, L. Smith-Gordon and C. O'Brien, p. 173, The Co-operative Union, Ltd., Manchester.)[1]

Profit-sharing and Labour Co-partnership.—In so far as this solution is involved in Co-operation, it has been touched on in the above paragraph. But the Report already quoted (Cmd. 544) also deals with the system as it has been applied in private firms. The results cannot be described as successful. Since 1829, 380 of these

[1] This book, from an authoritative source, is a very convenient summary of the history, the theory, and the practice of Co-operation throughout the world. It contains a vast number of facts that are of vital importance in considering the question of industrial organisation.

schemes have been started, but over 50 per cent. of them have, for various reasons, been abandoned. In October 1919, 182 were still in existence, but altogether they only cover a total employment of 243,000 workers for the 164 firms that returned statistics. The latest detailed figures refer to 1918, when apparently 81,833 employees took bonuses amounting to £229,728; which averaged £3 13*s.* 3*d.* per head for the year. This meant an average of 5·1 per cent. added to their wages, but the addition varied very much in different trades; in the chemical trade, for example, it meant an addition of 16·9 per cent. It is almost sufficient to point out that, after so many years' experimenting, such a poor total result is fairly conclusive that here again no great remedy has been discovered.

An examination of the Official Report tends to show that, taken as a whole, this method does not offer a large enough addition to wages or a sufficient share in control to influence the minds of the workers. It is only in the gas companies that the method has attained any substantial footing, and this is mainly because in that industry the circumstances are quite exceptional. For one thing, the profits to the shareholders are by statute limited by the price charged to the consumers (a very important point to bear in mind), so that there is a direct inducement for the directors to offer a bonus on wages increasing in proportion to the reduction of cost of production per 1,000 feet of gas; and, when the bonus is paid, in part in shares, there is a further very direct inducement to the employees to help in the reduction of cost, for their own immediate advantage. It is not asserted that this same inducement does not apply to other profit-sharing schemes, but in the case of the gas companies the inducement is perhaps more direct, or at least more obvious and more precisely regulated. However, in the case of the gas companies, the present price of coal has caused the bonus almost to disappear as the cost of gas rises. Again, in the case of gas supply, there is a continual need for fresh capital to open up new districts as the towns expand; this allows the company to issue the bonuses to its workers in the form of shares without over-capitalising the business. It is, however, on the co-management side that the method still more completely fails to satisfy. Without going into details, the position may be summed up in the statement that there seem to be no important industrial businesses in this country where the workers have any control which is effective against the general body of the share-

holders; the former are merely a permanent minority, which may satisfy the theory of co-management, but which is immaterial in practice; and, in a world of facts, theory takes a secondary place. Profit-sharing has been tried in many countries; a useful summary of results can be read in M. Trombert's report to the Congress of Bordeaux.[1] Reference can also be made to the excellent little *Co-partnership in Industry* (C. R. Fay, Cambridge University Press, 1913), where the very interesting experiments by the great French houses of Godin and Leclaire are thoroughly discussed.

The Godin Experiment.—This is probably the most radical break with the orthodox capitalist system which has yet been made an established success. Over a period of years the employees gradually bought out the original master, who allotted to them a share in the profits in the form of shares in the capital. As the shares were transferred to the workers, the profit bonuses were paid to the owner of the business, who was thus bought out and supplanted by his employees. But the original part of the scheme lies in the fact that each worker receives interest on his share only so long as he remains a worker in the firm; and at his retirement he also receives the capital value of that share paid in cash out of the current profits of the Society as they permit. By this ingenious device the shares of the company are always held by the workers actually engaged, and therefore currently interested in the welfare of the business, which they can assist or retard by their personal efforts or slackness. Had the shares been made the absolute property of individuals, then, on retirement, or death or sale, they would have become the property of external persons, who would have been in the same position as any other non-productive shareholder under the capitalist system.

The management of the Godin business is by no means a complete democracy. The manager, who appears to have the ordinary powers of the controller of a private business, is appointed by the General Assembly, composed of the "associés," *i.e.* those employees who have been in the firm and lived in the *familistère* for at least five years, and also hold at least £20 in capital shares. Such are the bare outlines of the Godin system in so far as they are more or less

[1] *Profit-sharing*, Albert Trombert, P. S. King, 1920, 2*s.* 6*d.*, a translation of a report made in 1912 on behalf of La Société pour l'Étude Practique de la Participation aux Benefices. It mentions all the important examples of profit-sharing throughout the world and adds details concerning their management and the practical effects of the system.

original in the organisation of industry. It may be added that here also, as is gradually becoming the case in all serious attempts to reorganise industrial machinery, the interest on capital is declared at a clearly defined sum—not all that is left over after the expenses of material and wages have been met. This is also, as we have seen, a characteristic of the loan capital of the co-operative movement; and another prominent individual instance is the case of the great French experiment of the Maison Leclaire, where the interest on borrowed capital is not to exceed a fixed maximum of 5 per cent.

Legislative Experiments.—So far, we have taken a broad glance at the chief voluntary experiments which have been possible under the existing general law. For example, the Godin Familistère was registered as a normal joint stock limited corporation under the general French Companies Acts. Co-operative and other schemes registered under the English Industrial and Provident Societies Act are in an intermediate position, for it may be maintained that these Acts were specially passed to strengthen the position of Labour as against the normal capitalist interests. Perhaps it is only a matter of degree; but the cases now to be mentioned are more distinctively over the border line, as clearer attempts to lay down a new principle in industrial organisation. To take a simple case as a beginning; there is, for example, the Co-operative Societies Act of Missouri, 1919, which lays down that no co-operative society founded after this Act can pay more than 10 per cent. interest on its paid-up capital, and that the distribution of the surplus must be in ratio to the sales and the raw material consumed in the process of production; and it further defines the amount which must be placed to a reserve fund. The limiting of interest on capital is, perhaps, the most important point, as a definite intention to control the share of capital as against the share of the producers or workers engaged. (*Internat. Rev. of Agricult. Econ.*, Jan. 1920, p. 20.)

In quite another field there are the Italian attempts to develop the collective-labour organisations of that essentially mediævally minded country. For example, there is the decree of February 6, 1919, to simplify the granting of loans to co-operative labour groups which are anxious to undertake public contracts (*Intern. Rev. of Agric. Econ.*, Feb. 1920, pp. 95–6). People in this country have little conception of the extent to which these direct labour contracts (without the intervention of a capitalist employer) are already gaining

a footing in the Italian industrial system. These labour groups undertake such works as the making and repairing of roads, canals, bridges, the construction of irrigation works and the improving of land. In the province of Ravenna (*ibid.* pp. 98–9) the peasants organise themselves as joint stock or co-operative societies, and enter collectively into leases under which they pay a rent or a share of the produce. One form of contract is known as " collective sharing," by which the group makes a contract with a farmer to perform certain agricultural services in return for a fixed share of the produce. In other cases the labour group buys land for its own occupation. There is a tendency in Italy to encourage such methods.

A less definite example of this tendency may be noted in the Sardinian Law of November 10, 1907, assisting the development of agricultural credit banks. Whether *post hoc* or *propter hoc*, it is significant that, whereas there were only three co-operative societies in Sardinia in 1907, in 1919 they had grown to 141 (*ibid.* pp. 99–100).

In England the Small Holdings Act, 1908 (8 Ed. VII. c. 36), s. 4 (2) gives extensive powers to a county council to assist agricultural co-operative societies by grants or loans; but that power has not been exercised with any substantial success so far.

In Queensland we find the Co-operative Agricultural Production Act (No. 36) providing for state advances of capital; likewise the Co-operative Sugar Works Act (No. 34), dealing with the case of sugar distilling works, with the provision that at least one-third of the shares must be held by persons who are growing the cane, another case of encouraging the producer against the mere non-producing shareholder (*Journ. Comp. Leg.; Rev. of Legis.*, 1914, pp. 86–8). But it is, of course, impossible to do more than indicate the general tendencies of modern legislation, by these few examples, purposely drawn from many parts of the world.

We must now deal in greater detail with the very recent and important French laws which apparently aim more definitely at strengthening the position of Labour.

The French Co-operative Productive Societies Law of 1915.— There is first the law of December 18, 1915, on " les sociétés co-opératives ouvrières de production et le credit au travail " described by its legal annotator (*Annuaire de leg. fran.* 1915, pp. 143–151) as the first specific appearance in French legislation of such organisations. His further summary of co-operative

societies in their modern form should be compared with what has been said above, in discussing that system: "Ce sont des sociétés commerciales ordinaires, formées, sinon en totalité, du moins en majeure partie, d'ouvriers qui s'unissent pour obtenir un gain plus fort, il ne s'agit plus de changer le sort d'une partie de la population." He points out that special favours were granted to such co-operative societies, in the matter of undertaking public works, by the decree of June 4, 1888, although they were still registered under the general company legislation, the societies in 1865 having refused special legislation. The main object of this law of 1915 seems to be to define the terms on which state grants or loans will be made to co-operative productive societies. Two-thirds of the managing committee must be working members (whether manual or clerical or technical or managerial) of the society; and the non-working shareholders' rights are strictly limited to a fixed interest laid down in the articles; while the rights (to a share in the profits) of workers who are not technically members are protected. Such seem, for our present purpose, to be the important sections of this Act; and they confirm the general tendency to restrict the interests of capital and defend the rights of the workers to both profits and management.

The French Law of 1917.—The law of April 26, 1917, "sur les sociétés anonymes a participation ouvrière," passed as an amendment to the Company Law of 1867, introduces a new principle in the law of industrial corporations. If a limited liability company decides to adopt the form "a participation ouvrière" (meaning by that phrase profit-sharing with employees), it is then governed by the terms of this new Act. The shares are to be of two kinds: (1) capital shares, and (2) labour shares (*action de travail*). The latter are held as the collective property of the whole employed staff (manual or clerical, etc.) of either sex, provided they shall have been at least one year in the firm and shall have reached the age of twenty-one. These members of the staff are to be incorporated as a "société commerciale co-operative de main d'œuvre," though it is, at least, doubtful what meaning should be attached to the section of the law which defines this matter. It has been suggested that there is an error in drafting this part of the act, although the intention seems perfectly clear. Any members of the staff who cease to be employed drop (in general) out of this internal co-operative society, which is accordingly composed of the floating population of the

active employees. This corporate body holds collectively all the labour shares of the company and to it is, therefore, paid the interest due to them under the terms of the profit-sharing fixed by the rules of the firm. These labour shares cannot be transferred, and therefore remain inalienably the property of the current employees as represented by their co-operative society. The dividends received on these shares are divided in accordance with the rules of their co-operative society as drawn up by its members. In this remarkable scheme one can detect the influence of the Godin manner of keeping the labour share of the profits in the hands of the current members of the working staff, thus preventing them becoming the property of non-workers, who would, to all intents and purposes, be non-productive shareholders of a capitalist kind. So far for the matter of profit-sharing.

This same law then lays down rules by which the working staff (as represented by its co-operative society) shall also be represented at the general meetings of the company; and, still more important, also represented on the managing committee of the company. The number of labour representatives on this latter must be in the ratio of the total capital shares to the labour shares. (*Annuaire de leg. fran.*, 1917, pp. 107–12.)

The French Trade Unions Law of March 12, 1920.—This very recent law may likewise be a far-reaching measure; for it introduces the new principles[1] that trade unions may not only be instruments of labour defence, but on stated terms may take part themselves in organising industry. Under the general restriction that they must not distribute monetary profits to their members, they may buy tools and hire them out to their members, and act as voluntary agents for the sale of the goods produced by members of the union. Still more important, there is the broad permission to subsidise co-operative societies whether for production or distribution. Further, the unions can, out of their funds, build workmen's dwellings and buy land for allotments. For all these purposes a union can, apparently, make a binding contract with other unions or corporate

[1] It is not yet quite clear to what extent an English trade union can make the organisation of industry an object of its constitution under the Trade Union Act of 1913, sect. 10. Can it spend its funds in organising a factory of its own instead of spending them on strike pay? Is investment in labour trading organisations *ultra vires*? It certainly was not the intention of the English Act to make it so, as it was the deliberate purpose of this French Act.

bodies. The general effect of this law is that a strictly labour organisation is hereby allowed to support industrial undertakings, and own and initiate trade in such vital necessities as houses and agricultural land. (*Journal Officiel*, March 14, 1920; with summary in *Intern. Rev. of Agric. Econ.*, April 1920, pp. 289–90.) Whether this be a sound principle or not, the fact is that we have in this French law a clear encouragement to purely working-class organisations to organise industry independently of the aid of the usual capitalist resources. It may be only an indirect measure for that end, but it is altogether significant when considered beside other movements of the times already noted and especially, for example, the important Guild movement at present so prominent in English industrial discussions, to which reference may now be made.

The Guild System.—During the last few years a theory of industrial organisation has gradually been materialising which may be said to have had its recent origin in Mr. Arthur J. Penty's book, *The Restoration of the Guild System* (Methuen, 1906). (See also his *Old Worlds for New*, 1917, and *A Guildsman's Interpretations of History*, 1920, Allen & Unwin.) This idea has been developed in its application to modern industry mainly in the columns of the *New Age* by the Editor, Mr. Orange; and by Mr. S. G. Hobson in various books, *National Guilds and the State*, etc. (Bell). (See also *The Meaning of National Guilds*, by M. B. Reckitt and C. E. Bechhofer; Cecil Palmer.) Mr. S. G. Hobson has, during the last few months, gone far beyond theory by taking a leading part in establishing a Building Guild in Manchester and district; and very important steps have been made both in theory and practice by Mr. Malcolm Sparks and the other founders of the Guild of Builders (London), Ltd., registered under the Industrial and Provident Societies Acts, 1893–1913. The whole movement is the most significant summing up of the various tendencies which we have seen in the private and public industrial developments already mentioned in this paper. The essential elements are these two factors: the protection of the producing workers as against the shareholders, and the right of management by the actual working staff. It is, of course, impossible here to discuss the historical basis of the guild theory or even its modern developments in any detail (see the present writer's *The Guild State*, 1919, Allen & Unwin); but it is proposed to use it as the foundation of a suggestion for a modification of the present Com-

panies Acts which might prove a real satisfaction of the demands of the workers, without resulting in any violent disorganisation of that delicate thing, the economic situation. If it were possible to express the guild idea in the terms of a Companies Act, it might be the basis for a stable industrial system. In the following paragraph the main clauses of a Guild Company Act will be sketched in the hope that they may at least be the basis of a detailed discussion. There is one preliminary comment that may be helpful in meeting a good deal of hasty criticism. When it is said that the main idea of the scheme is to consider the interests of Labour, in distinction to the main emphasis of the present joint stock company on the protection of capital, it is necessary to note precisely what labour and capital represent in that statement. A millionaire represented in a company entirely by his shares is a capitalist for the purpose of this discussion. But the same man who is also a managing director and an active organiser of the business is, to the extent of that work, and quite apart from his share interest, on the labour side of the problem. Whether he may get too large a salary or too high a director's fees, may be argued, but that he is entitled to a salary for his labour is an inevitable deduction from the labour theory. Likewise all the managers, technical staff, and black-coated employees in general must be included in a scheme which professes to protect the rights of labour against the undue demands of capitalists. With that preliminary note the scheme will appear in outline when we sketch the main clauses.

A Guild-Company Law.—The essential clauses of such a law as is contemplated would be as follows:

(1) Every Guild Company must define in its Articles of Association the amount of interest which can be paid on the capital of the Company. In other words, the maximum share of capital in the profits will be precisely stated, instead of leaving it, as in the present capitalist company, as all that is left available for distribution as interest after the cost of production, *i.e.* expenses of wages, material, etc., have been met. Labour will then feel that it is the residuary legatee, as it were, which will get all that can be saved by efficient management and good work. The centre of gravity of the industry will be transferred from the non-workers' side of the corporation to the productive side; on which side, as noted above, will be all so-called middle-class workers, as well as the manual workers. This

essential clause will be a frank acceptance of the claim of labour to its full share of the profits. The interest payable on capital will not necessarily be a sum fixed by the statute: for it must, under present conditions, vary within limits. It might be sufficient to fix a maximum rate which no dividends could exceed. For presumably no industrial group, such as a labour guild, would weight itself on starting by raising more borrowed capital than was necessary, and it would not offer a higher rate of interest than enabled it to raise the necessary sum. But the bargain, when made, would be strictly binding, and, when paid, labour would be the possessor of all that was left. Indeed the whole position might be best expressed legally by putting all share loan-capital into the form of debenture stock; a method which would give security to the holders, and at the same time free the labour staff from interference by shareholders' votes in the management of the Guild.

(2) The Articles of Association must also lay it down that (as in the French Law of 1917) every worker, with the qualification of full age and a minimum period of service, should be given an adequate position in the general meetings by which the affairs of the corporation would be ultimately controlled. This is, perhaps, the crux of the problem. It is surely advisable to give an opportunity for labour to test fully its claim to managing powers. It is suggested that when Labour knew that all the surplus (over necessary costs and interest on loan capital) went into its own pockets, it would then take an intelligent care in seeing that it got the best managers and technical staff available; and, as that staff could only be procured in the open market (under present conditions), the bargaining between the two parties would probably end in a fair salary of management being paid to an efficient official. There is every reason to hold that a good manager or technical adviser would get as good a salary from a labour guild as he is paid by the capitalist company, and there are many reasons for thinking that his position would be more stable; for it must be remembered that he, as himself a member of the labour staff, would be a voter of the guild. The criticism that a democratic control of the guild would result in want of discipline and an entire disregard of anything but the rights of the majority of the manual workers may be met by the obvious reply that a guild which voted the wrong men into the controlling post, or refused to obey them, would quickly suffer the penalty of failure

and extinction when in competition with any other firm which, (whether capitalist or guild) managed its affairs more sensibly. The system of profit-sharing has failed partly because the share offered to labour has been insufficient to attract the workers, but still more probably because, so long as capital primarily takes the direct responsibility for loss, the workers are comparatively indifferent as to the fate of the industry. It is, likewise, considered a little ridiculous to give the workers a real share in the management unless they are prepared to lose something if they fail. The right of control must, in justice, be in the hands of those who are responsible for errors if they are made. Under this proposed Guild Law, it would be a fair contest between a business managed by an autocratic master and one controlled by a democratic vote of all the full members of the guild.

(3) There is, of course, no reason why corporations registered under the present Companies Acts should not adopt rules which would carry out the above two clauses; although it is clear that they are contrary to the main purposes of these statutes. But we now come to a proposal which would need fresh legislation. If labour were given the statutory machinery for exercising a right to the main profits and the main control, it is not impossible that public opinion would demand some reasonable guarantee that these rights should not be exercised in an anti-social manner. We are living in a period of millionaires and profiteers. The State can scarcely be expected to be enthusiastic in allowing labour guilds to take their place. So it is suggested that every guild company should be subject to the control of its prices; in return for which concession to public requirements, various advantages might be given to the guild to protect it against the competition of the unrestrained capitalist company—so long as the latter is left uncontrolled in its prices; although it is fairly obvious that the public will, in general, transfer its custom to the factory or shop where the price is controlled. Now the nature of the administrative machinery which will fix prices is a difficulty which must not be denied. As a matter of scientific economics, it is surely well within the capacity of man to work out the cost of production; it is only the process of "costing," which every efficient factory manager ought to know. This will be based on cost of raw material, plus overhead charges, plus the cost of labour. The cost of labour is a factor which depends partly on the

current standards of public opinion, but for immediate purposes it can be described as the standard wage recognised by the trade unions. It is not so material to discuss the point, since we are here dealing with a corporation where all the surplus profits go to labour in a broad sense, and not to capital. But although the determination of fair prices, on a basis of cost of production, is fairly easy, yet its enforcement is open to all sorts of possibilities of corruption. It is suggested that, whatever may be the form of the preliminary tribunals which will consider this matter and fix the prices, there will be need for an ultimate Court of Appeal which will rank in dignity with the legal appeal courts. But the subject is one which cannot be discussed here in detail, beyond the remark that it is an absolutely essential part of the scheme if it is to offer any real reform in industrial life in regard to the community as a whole as well as to the working classes.

(4) The privileges that could be granted to such guild companies are of many kinds and degrees. This matter would depend on the desire of the legislature, *i.e.* public opinion, to encourage their formation. There could be, for example, a partial relief from income-tax, as in the friendly societies and the co-operative societies. There might be reduction of stamp duties and simplification of procedure as in the cases under the Industrial and Provident Societies and the Benefit Societies Acts. If the community found that, under the guild companies, it got rid of labour unrest, and also procured its goods without paying the price of profiteering, then the inducements offered to an industry to convert itself from capitalist to guild control would be undoubtedly substantial. The matter will not be decided on abstract grounds of justice or class views. It will be a competition between two systems, and the decision will be on their practical merits. If Labour cannot provide better goods than Capital, then the general public will probably prefer to go on as things are at present. If the guild company system gives industrial rest and efficiency, then it will be chosen. To force a new system by compulsory legislation would be madness. When the workers are ready to try a new plan they will do so. The proposed modification of the law is only, as in the case of the various French and other legislation mentioned, an offer of legal machinery by which they can register their experiment when they are ready to make it. It is suggested that, for the protection of society as a whole, it is

necessary to try such an experiment in industrial organisation which is not a timid avoidance of the problem, but is a frank acceptance of a radical change. The guild company above outlined might meet the demands of labour. The question of paying interest on capital in any form, of course, will be rejected by the middle-class doctrinaires who are mainly leading the revolutionary movement. But a less theoretical and more common-sense democracy may see all kinds of advantages in allowing (at least for this imperfect present) a fair interest on loan capital to be paid as an inducement to the individual not to spend all his earnings as he receives them ; putting them instead, in part, into the development of capital which will benefit the community. But the economic and moral status of interest cannot be discussed here ; it must probably be accepted for the moment as a factor in any practical scheme which deals with to-day and not the visionary future. Besides, under the proposed Guild Company Law, no one will be compelled to pay interest on capital if it can be raised in any other way. The guild company is only a practical way of protecting labour so long as capital has a marketable price—paid in interest.

LAND SETTLEMENT OF EX-SERVICE MEN IN AUSTRALIA, CANADA, AND THE UNITED STATES.

[*Contributed by* A. J. HANNAN, ESQ., *Parliamentary Draftsman, South Australia.*]

QUITE early in the Great War it came to be generally accepted in Australia that a number of the men on active service would, after their return to Australia and discharge from service, desire to engage in farming, dairying, or some similar open-air occupation, rather than return to clerical or other indoor work. The provision of farms for discharged soldiers was felt to be the form of repatriation most acceptable to the men themselves and most beneficial to the community, and the various States were practically committed to such a scheme by their politicians and prominent citizens publicly promising, as an additional inducement to eligible men to enlist for active service, that every returned man should have a farm of his own if he wanted it. Of the Australian States, South Australia was first in the field with an Act passed in 1915 (No. 1226). This Act followed very closely a New Zealand Act (No. 45) passed in the same year, which authorised the allotment of Crown lands to discharged soldiers on specially favourable terms and made provision for liberal financial assistance to the soldier settlers. This Act, which appears to be the earliest legislation of its kind passed by any of the belligerent countries, is still in force. It has been amended by No. 4 of 1916, No. 17 of 1917, and No. 49 of 1919, but its main features have not been altered, and in general it may be said that the New Zealand legislation is similar in character to that in force in Australia. Speaking of the assistance which is given to soldier settlers, the Prime Minister of New Zealand (Hon. W. F. Massey) said in September 1918:

> Over 700 soldier settlers have already been provided with land, and, so far as it is possible to judge, most of them are doing well and on the road to success. The new settlers get the land at cost price, and financial

assistance is given to those requiring it, up to £500 being lent in most cases, but in special cases £750 may be advanced on the recommendation of the Land Board. Five per cent. interest is charged, and the conditions are made as easy as possible. If an intending settler wants land for sheep-farming or dairy-farming or the growing of cereals or fruit-growing or poultry-farming, the Land Board will endeavour to suit him, and it is generally successful.

In 1916 it was agreed between the Commonwealth and State Governments in Australia that the settlement of discharged soldiers on the land should be left entirely to the States, the Commonwealth Government agreeing to lend to the States the money required to acquire the necessary land and to construct railways, roads, and other works necessary to enable the land to be successfully occupied. All the other States shortly afterwards passed legislation following in its main features the South Australian Act.[1]

Beneficiaries of the Legislation.—In each State the legislation is administered by a Minister of the Crown who is, of course, responsible to Parliament. In South Australia a special portfolio, that of Minister of Repatriation, has been created for the purpose. As the privileges conferred by the legislation were intended primarily to be by way of reward for undergoing the dangers and hardships of active service, care has been taken in most of the States to restrict the term "discharged soldier" to men who had done something more than home service. Hence the benefits of the legislation are in each State offered to ex-members of the Australian Imperial Force or of the Royal Australian Navy who served overseas. The number of ex-navy men who are eligible is, however, so small as to be negligible. Queensland goes farther, and includes ex-members of the Australian Imperial Force, notwithstanding that they may not have seen active service outside Australia. All the other States exclude home service men, but make an exception in favour of men

[1] The Acts at present in force in South Australia are the Discharged Soldiers Settlement Act, 1919 (No. 1313) and two amending Acts, Nos. 1346 and 1388, passed in 1918 and 1919 respectively. Victoria has the Discharged Soldiers Settlement Act, 1917 (No. 2916), and an amending Act passed in 1918 (No. 2988). In New South Wales the principal Act is the Returned Soldiers Settlement Act, 1916 (No. 21) which has been amended by Act No. 24 of 1917 and Act No. 51 of 1919. In Queensland the principal Act is the Discharged Soldiers Settlement Act, 1917 (No. 32), which has been amended by Act No. 8 of 1918. In Western Australia the Act in force is the Discharged Soldiers Settlement Act, 1918 (No. 9 of 1919), while in Tasmania there is the Returned Soldiers Settlement Act, 1916 (No. 20 of 1916), and an amending Act passed in 1919 (No. 26 of 1919).

who enlisted for service abroad, but were unable to serve abroad through circumstances not within their own control. Under the legislation of each State men who have been discharged for misconduct or incapacity resulting from their own fault are excluded from the benefits of the legislation.

Eligible Combatants. — The question whether ex-service men from Great Britain and other parts of the Empire should share in the benefits of the legislation was not an easy one for the State Legislatures to decide, and the answer turned to a great extent upon whether there was likely to be any surplus of land or money available after the needs of the Australian Imperial Force had been provided for. Over 300,000 men who enlisted in Australia served overseas, and thus became eligible to participate in the benefits of the land settlement legislation. In addition, a number of Australians, army reservists and others, journeyed to England and joined the British Army. Though at least 65,000 of the total number of Australians who went overseas died on service, the number of potential applicants is not thereby appreciably reduced, for the dependents of most of these deceased soldiers are eligible. Assuming that one-quarter of the whole number of possible applicants would desire to go on the land and would be qualified, the total number for whom land would have to be found in Australia would not be less than 75,000. The outlay for settling each man would be about £2,000, or a total of £150,000,000. Though the State Legislatures do not appear to have had before them any but the most modest estimates of the numbers requiring settlement, most of them considered that they would hardly have enough land to provide for the settlement of Australian ex-soldiers, and that they would not be justified in allowing Imperial ex-service men generally to apply. Hence in the States of Victoria, New South Wales, Western Australia, and Tasmania the only ex-members of the British Army or Navy who are eligible are men who before their enlistment were resident in Australia, subject in the case of Tasmania to the qualification that the Act extends to non-residents of the Commonwealth who have served in the British Army or Navy, and who have come to Tasmania under an arrangement made between the Government of Tasmania and the Imperial Government. Queensland and South Australia go farther and include ex-members of the Australian Imperial Force notwithstanding that they may not have seen active

service outside Australia, and in the case of Queensland the Minister administering the Act has power to extend the benefits of the Act to discharged soldiers of any Allied Force. But certainly in the case of South Australia, and probably in the case of Queensland, this implied invitation to ex-service men in other parts of the Empire to settle in Australia on favourable terms is for the time being illusory, for these States at present are experiencing great difficulty in providing sufficient suitable land for the settlement of their own men, though Queensland is the most fortunately situated of all the States in having a considerable quantity of virgin land of good quality, which will ultimately be available for settlement. So in Canada, though the Soldier Settlement Act makes ex-members of the British Army or Navy eligible for assistance to settle on the land, their colonisation will not be considered until the interests of the ex-members of the Canadian Expeditionary Force have been adequately provided for.

In all the States except New South Wales the immediate dependents of a deceased soldier are entitled to the same benefits as the soldier himself would have been entitled to had he lived. Under the legislation of each State Crown lands may be set aside for allotment to discharged soldiers and dependents of deceased soldiers. The Acts of all the States contain provision by virtue of which the soldiers may take up the land reserved under more favourable conditions than ordinary settlers. In the case of all the States there is power to reserve ordinary Crown lands for allotment to discharged soldiers exclusively. It is to be noted that none of the Australian States is able to offer free land to soldiers, as Canada does in some cases. As the amount of Crown lands available in each State which is suitable for soldier settlement is limited, power has been taken in each State to acquire private land either compulsorily or by agreement for the settlement of discharged soldiers. In South Australia the power of compulsory acquisition is limited to estates of the unimproved value of £15,000 or over, and in New South Wales to land exceeding £20,000 in value, or £10,000 if within fifteen miles of a proposed railway.

Tenure of the Land.—The different tenures upon which the land is to be held vary somewhat in each State, but the following tenures are the most usual, namely—(*a*) agreement to purchase, (*b*) perpetual lease, and (*c*) lease for a term of years.

Under an agreement to purchase a returned soldier of little or no means is enabled to acquire the fee simple of his land by small periodical payments of principal and interest spread over a period of thirty or forty years. In each State except Queensland a soldier applying for land must obtain a certificate from a Qualification Committee testifying to his fitness to occupy land successfully. If the applicant for a qualification certificate is without previous experience, he may, in most of the States, obtain the necessary experience on a Government training farm, the establishment of which is provided for under the legislation. The course of instruction on these farms is such as to enable the ex-soldier to acquire the knowledge requisite for agricultural, horticultural, viticultural or dairying pursuits, pig-raising or poultry-farming, and to test his aptitude for the particular occupation in which he proposes to engage. Power is also given for the Government to arrange with experienced farmers, dairymen, and others to receive ex-soldiers on their farms for a specified period in order to teach them the business.

Under the South Australian legislation land allotted to a returned soldier is allotted in the first instance on permit only. The allottee holds under the permit for twelve months, which is considered sufficiently long to determine his qualifications for successfully occupying the land, and only upon completion of this period of probation is an allotment on a permanent tenure made to him. Certain of the other States adopt this system as a matter of administration.

Nature of Assistance.—Each State makes provision also for liberal financial assistance to a discharged soldier whose application for land under the Act has been approved. The purposes for which advances may be made are in the case of all the States, except Queensland, the following: (1) clearing, fencing, grading, draining, irrigating, water supply, and general improvement of the land; (2) the erection of buildings on the land; and (3) the purchase of implements, stock, seeds, plants, trees, and such other things as may be deemed necessary for the successful occupation and cultivation of the land.

In Queensland advances may be made for effecting any kind of improvements on the land, and the maximum amount which may be advanced is £500. This is the maximum also in Victoria and Western Australia, whereas in Tasmania the maximum amount

which may be advanced for the erection of buildings is £400. In New South Wales and South Australia there is no maximum prescribed. The advance is usually repayable by instalments over a fairly lengthy period, and the rate of interest is low, much lower than the rate payable by the Commonwealth for the loan moneys out of which the advance is made. The discharged soldier must give security for repayment of the advance. Such security is usually by way of mortgage of the allotted land, together with a bill of sale over the soldier's stock and implements, or over his furniture or other goods, if additional security is considered necessary. A number of ex-soldiers held land, either freehold or Crown land held under perpetual lease or lease or agreement with right of purchase, prior to their enlistment, and provision is made to treat such men in the matter of advances on the same terms as if the land they hold had been allotted to them under the Discharged Soldiers Settlement Act.

Soldiers' Payments.—All the Acts give power to remit or postpone the payment of rent or any instalment of purchase money for land payable by a discharged soldier where a case of hardship is shown. In most of the States the best of the land suitable for farming or horticulture has already been taken up, and consequently the soldiers will often have to take land which is at present virgin soil. Accordingly provision is being made in all the States for the Government to clear, drain, and fence land, and otherwise prepare it for occupation by discharged soldiers, and usually discharged soldiers awaiting farms are employed at this work at current rates of pay. As the conditions under which the returned soldier holds his land are so favourable, and as the financial obligations of the Government with respect to the land are of a benevolent character, it is undesirable that any other than returned soldiers should obtain the benefit of these privileges by any mode of alienation of the land. Provision has accordingly been made in all the States limiting the right of a returned soldier to transfer or mortgage land allotted to him. In all the States except Queensland it is necessary to obtain the consent of the Minister administering the Act to any transfer or mortgage, and New South Wales goes so far as to provide that the Minister is to consent to a transfer within the first five years only in the case of sickness, financial difficulty, adverse circumstances, or incapacity, and in such cases the transfer may be made only to another discharged soldier, or to the widow of a deceased soldier.

Finance of the Schemes.—As already stated, the money required by the various State Governments to carry out the purposes of the Acts is lent to the States by the Commonwealth Government. Under the arrangment made with the States the Commonwealth Government will also make available working capital to be advanced on loan by each State to its soldier settlers. The amount agreed to be provided by the Commonwealth is not to exceed £625 for any settler. The expense incurred in the settlement of discharged soldiers on the land will necessarily be great. The original estimate of £40,000,000 has been found to be much too low, and probably at least a further £40,000,000 will be required before all those ex-soldiers who have applied and are qualified can be effectively settled. The total sum represents an amount of £16 for every man, woman, and child in Australia, and this for one form of repatriation merely. How the country, without exhausting itself financially, is going to raise the additional money required, whilst at the same time meeting the huge annual interest bill for Commonwealth and State loans, and providing for ordinary expenditure, is one of the most serious problems confronting Australian statesmen. There is the further question whether this huge expenditure will be justified, even from the point of view of the ex-soldiers themselves. It should be remembered that the quantity of good land in each State which is reasonably accessible is limited, and it is agreed that ex-soldiers should not be settled on any but good land. It was originally expected that a large amount of suitable land might be made available by acquiring, ether by purchase or by compulsory process, large estates comprising good agricultural land which were being used wholly or largely for pastoral purposes, and by rendering accessible remote areas of good agricultural land by the provision of railways and roads. Both of these means have been resorted to, but not much additional land has been rendered available as a result. The buying out of an individual farmer in order to replace him by a discharged soldier should not be resorted to except in special circumstances, for this would be merely to replace one farmer by another, and that other usually a much younger and less experienced farmer than his predecessor. It has, however, been found difficult in practice to satisfy the great demand for land by other means. Another drawback is the high cost of the purchase of a farm, often amounting to £2,500 or over, and only sufficing for the settlement of a single soldier.

The Government, too, is subject to the usual disadvantage which attends the operations of a Government in the land market, that it has almost always to pay a higher price for land than a private purchaser. In fact, the wholesale purchasing of land under the Acts by the various State Governments has actually helped in some localities to create a boom in the price of farm and orchard land. Moreover, many of the ex-soldier settlers are necessarily men with little or no capital, and even now some of them have to receive subsistence allowances from the Government in order to maintain themselves on their land until their crop grows. If Australia should be visited by two or three years of severe drought (a misfortune which at present is by no means improbable) the soldier settlers will in most cases only be kept on the land by further extensive financial assistance from the Government. It is obvious that the greatest care should be taken to avoid any action that would tend to deprive the soldier of his self-reliance and self-respect, and it is against the best interests of the soldiers themselves that they should rely unduly upon the State in the period following discharge. Undoubtedly the best policy towards the soldier is to surround him with conditions that will tend to strengthen his self-confidence and self-reliance. On the whole there would seem to be something to be said in favour of a more modest scheme of soldier settlement, the balance of the money available for repatriation to be expended on the establishment or extension of new Australian industries, such as the manufacture of woollen goods, in which the outlay per soldier would be much less and the employment would be skilled and highly paid, and which would be independent of drought and similar vicissitudes. Experiments which have been made in the establishment of returned soldiers in woollen factories on co-operative principles have been most encouraging.

Canada. — An instructive comparison is afforded by a consideration of the legislation of other countries, especially Canada and the United States of America, for the settlement of discharged soldiers. In Canada the Dominion Government controls large areas of Crown lands in the Province of Manitoba, Saskatchewan, Alberta, and British Columbia. The Dominion Government proposes to reserve the greater part of this land for sale to ex-service men. All homestead Dominion lands within fifteen miles of existing railways have been reserved for soldier settlement.

The benefits available to ex-service men are conferred by the Soldier Settlement Act of the Dominion Parliament, intituled, " An Act to assist returned soldiers in settling upon the land." The Act is administered by a " Soldier Settlement Board," and in carrying out its provisions the Board has two main objects in view:

(1) To assist returned soldiers in re-establishing themselves in civil life by settling upon the land. (2) By such assistance to the returned soldiers, to develop the agricultural resources of the Dominion and to increase agricultural production.

The classes to which assistance may be granted under the Act are similar to those covered by the Australian legislation, and include ex-members of the Naval or Military Forces of Canada or Great Britain with good discharges, and also include the widows of soldiers and sailors belonging to such Forces whose husbands died while on active service. The assistance which may be granted is as follows:

(1) To qualified settlers purchasing land from the Soldier Settlement Board financial assistance may be rendered up to a maximum of $7,500; (2) to qualified settlers on Dominion free land financial assistance may be rendered up to a maximum of $3,000; (3) to qualified settlers who already own agricultural land financial assistance may be rendered up to a maximum of $5,000; (4) a free grant of 160 acres of land may be made to any returned soldier in addition to the 160 acres free homestead land which he may secure as a civilian.

All loans made under these provisions bear interest at the rate of 5 per cent., and, except in the case of loans on live-stock and equipment, will run for twenty-five years. No interest charges are made on loans for stock and equipment during the first two years. Under powers conferred by the Act agricultural training is provided for those ex-members of the Forces who are inexperienced in farming, either by placing them with a specially qualified farmer for a period of one year or on a training farm for a portion of that period and later with a farmer. All men in training at a training farm receive free board and lodging and an allowance for dependents. Married men receive the same consideration while in training with a farmer. The men are paid while they are gaining experience at the current rate of wages. In addition to rendering financial assistance, and giving opportunities to gain experience, the Soldier Settlement Board assists the returned soldier in various other ways;

for example: the Board has made arrangements with manufacturers of implements, harness, etc., dealers in live-stock, and timber merchants, for special prices to soldier settlers. The Board also has a staff of agricultural supervisors whose duties are to visit personally and promote the success of soldier settlers by means of their advice and assistance. There is power under the Act, as under the Australian legislation, to purchase compulsorily for soldier settlement suitable agricultural lands that are being withheld from cultivation. In addition to the Soldier Settlement Act, the various Provincial Governments have also passed legislation providing schemes for placing ex-service men on the land. It is estimated that the cost of the Canadian scheme will be $150,000,000.

United States. — The United States was confronted with much the same problem as existed in Australia and Canada. It was estimated that probably three-quarters of a million American soldiers would want to settle on the land at the conclusion of the war. Much the same situation had to be faced at the close of the American Civil War; but then the problem was easier of solution, for vast areas of public lands suitable for settlement were at that time available. These lands were immediately thrown open to settlement, and the country was thus enabled to recover from the economic effects of the war more rapidly than would otherwise have been possible. Public lands are no longer available for this purpose, but apparently there are still immense areas of unused lands, and it was proposed that employment should immediately be given to returned service men in the reclamation of such lands, and that the lands when reclaimed should be offered to them for settlement. A comprehensive plan with this object in view was drawn up by the Government, and Bills to give effect to the plan were submitted to Congress. The most important of these Bills provided for a scheme of joint State and National aid to land settlement based partly on the schemes already in operation in Australia. The Australian legislation and the manner of its administration had been studied beforehand by those responsible for the scheme. The Bill authorised the Federal Government to lend to the States money with which to buy, improve, and settle the land, and the Federal Government was to construct and manage all public works such as Irrigation Systems. The State Governments were to select lands, buy them, improve them, and choose the settlers, and be responsible to the Federal

Government for the return of the money lent to them. Both Houses of Congress reported favourably on the Bill, and from the nation at large it received much support. It would appear that in the United States the settlement of discharged soldiers has been the subject of long consideration by experts, and that the scheme ultimately adopted avoids the substitutionary settlement feature of the Australian plan by proposing to use for the settlement of discharged soldiers the large areas of unreclaimed lands which are available. By this means the area of settlement will be considerably enlarged and the agricultural resources of the community augmented. A commencement has been made in the United States in soldier settlement on the part of some of the States, notably California, which was the first State to put into operation the State Land Settlement plan.

Substitutionary Settlement in Australia.—It is important to remember that in Australia conscription for military service never became law, and that the principal motive for embarking upon so ambitious a scheme of land settlement was sentimental, namely, the desire to redeem promises made to ex-soldiers as an additional inducement to enlist that every man who returned should have a farm of his own if he wanted it. Such promises were freely made by politicians and others from the early stages of the war, but in no State was there ever a preliminary investigation made of the amount which the soldier settlement scheme might be expected to cost, the possibilities of successful settlement, and above all whether there would be sufficient inducement for the average town-bred soldier to remain permanently on the land, or whether there was not some alternative repatriation scheme which would offer him an easier and less precarious livelihood. Lord Haldane's Committee on the Machinery of Government came to the conclusion " that in the sphere of civil government the duty of investigation and thought, as preliminary to action, might with great advantage be more definitely recognised," and it would appear remarkable that in Australia, the land of Royal Commissions, this principle was not acted upon in the case of soldier settlement. It would appear that in Australia the soldiers' land settlement scheme can only be carried out by resorting largely to the system of substitutionary settlement to which reference has already been made. This system is economically unsound. It involves no widening of the area of cultivation, but only the substitution for experienced farmers of discharged

soldiers, usually comparatively inexperienced, who have the added handicap of having to meet almost from the start a fairly substantial annual charge in the shape of interest, and rent or instalments of purchase-money. Canada and the United States, on the other hand, have framed their soldier-settlement schemes after a full consideration of all the facts, especially the nature and quantity of the land available, the probable number of settlers, and the estimated cost of the scheme, and also after considering the advantages of other modes of repatriation.

Financial Difficulties.—The difficulty already touched upon of financing so vast and expensive a scheme is already becoming urgent. The Commonwealth, in pursuance of the arrangement entered into with the States, has already agreed to provide £40,000,000; but it has been found that a very much larger sum will be required, and at a Conference of Ministers of Lands of the States held in Melbourne in May 1920 the Commonwealth was asked to arrange further large credits. At a Conference held in 1919 it was estimated by the Commonwealth Government that 20,000 soldiers would desire to go on the land on their return from active service, and a quota of that number was allotted to each State. An estimate of the cost of settling them was submitted to that conference, and it was agreed by the Commonwealth to advance to the States the money required by the respective States to settle their quotas. The number of applications received from the soldiers has, however, far exceeded anticipations in all the States. For example, the quota for South Australia is 1,678, and the applications received are well over 4,000. It is certain that this State will have to settle at least that number. The quota for Victoria is 6,000, and the number of approved applicants in that State is now 11,000. The figures for the other States are also greatly in excess of the estimate. There is no doubt that the amount provided by the Commonwealth will be totally inadequate, and one of the principal objects of the Conference of May 1920 was to ascertain the position in each State, and place a statement before the Commonwealth Government with a view to obtaining the funds necessary to carry out the schemes. The total sum required to settle the men is so great that the State Ministers were unable to come to any definite arrangements with the Commonwealth Minister of Repatriation, who asked for further time to consider the matter. In the meantime he asked the Ministers of Lands to give further

consideration to the matter, and, if possible, to alter the schemes of settlement so as to reduce the average cost per settler, and thus lessen the total amount that will have to be provided.

The Magnitude of the Australian Scheme.—Provision has been made in Australia for soldier settlement on a scale which has never been equalled by any nation, and which surpasses the provision made by any other country engaged in the Great War. Whatever criticisms may be offered upon the Australian scheme from the economic standpoint, there is no doubt that it presents the clearest evidence of the practical interest of the Australian Governments and people in the welfare of the men who fought for them in the Great War, and their manifest desire to let no question of expense or trouble stand in the way of their doing what they consider the fair thing by these men. This is what gives its distinctive character to the Australian legislation. In history there have been many instances of a victorious general dividing up some portion of the conquered territory amongst his soldiers, and even of the State taking in hand the settlement of its veterans in particular localities (*e.g.* the Roman *coloniæ*) but these settlements were almost invariably undertaken for purposes of defence, to hold down a hostile population, or for other objects of military strategy, or from a purely economic motive. There is no record of any State having ever undertaken the settlement of its ex-soldiers in such great numbers and under such favourable conditions by way of recompense for the hardships and dangers of service in the field. The Australian land-settlement legislation will always be the most effective token of the gratitude of Australia to the sailors and soldiers who served her in the Great War.

THE NEUTRALITY OF THE CHANNEL ISLANDS DURING THE FIFTEENTH, SIXTEENTH, AND SEVENTEENTH CENTURIES.

[*Contributed by* E. TOULMIN NICOLLE, ESQ., VICOMTE OF JERSEY.]

THE Neutrality of the Channel Islands dates from the latter half of the fifteenth century. Some historians have suggested that it is of remoter origin, but there does not seem to be any evidence to support this view.[1] Ever since the separation from Normandy, the islanders, too weak to defend themselves, had suffered the lot of the shuttlecock between their powerful and quarrelsome neighbours. A constant state of war and the attacks of pirates had brought great misery upon them. For protection they had to rely upon the English fleet and the small garrison kept in the castles.

Ultimately, political and geographical considerations induced those responsible for the government of the islands to seek a remedy. The islands were conveniently situated on the great trade route. Particularly was this the case as regards Guernsey, whose harbour at St. Peter Port had long been considered a free port, and offered a safe roadstead. From these points of view the islands were useful to both nations. Nor was this all. Many of the great monasteries in Normandy held property in the islands, and the Bishops of Coutances still exercised ecclesiastical jurisdiction there. In times of disorder they were unable to collect their revenues. We see, therefore, that there existed powerful reasons to adopt some method of maintaining peace in these islands, and the remedy was found in their neutralisation.

Bull of Pope Sextus IV.—An understanding was arrived at between the English and French Kings that the islands should be considered as neutral territory, and we find Edward IV., in the last year of his reign, applying to Pope Sextus IV. to issue a Bull placing this privilege under the protection of the Church. The Pope complied with his request.

[1] Had it been recognised in the thirteenth and fourteenth centuries, it would certainly have been invoked by the islanders in their numerous petitions to the Crown for help from the constant attacks of the French. Edward III would have pleaded the practice in his letter addressed in 1376 to the Cardinals at Bruges, keepers of the truce, protesting against the ransoms levied upon the people of Jersey by Bertrand Du Guesclin, in defiance of the truce between England and France. (Cambridge Univ. MSS., D.d. iii. 53, fol. 163.)

The Bull is dated March 1, 1483–4, a year after Edward's death. On its promulgation Richard III., apparently jealous of Papal interference, directed an inquiry through Thomas Hutton, Clerk of the Council, as to whether the Bull might not be prejudicial to the interests and prerogatives of the Crown.[1] We do not know the result of this inquiry, but the Bull appears to have been recognised.

The Bull—a lengthy document—has been preserved in an *inspeximus* of Henry VIII., dated May 12, 1512.[2] The preamble declares that Edward had represented to the Pope the perilous position of the islanders through the attacks of pirates of all nationalities. The Pope declares that all who should molest the islanders were to be excommunicated, whether the crimes were committed in the islands or on the seas within sight of them. Excommunication was also to be the punishment for all who favoured these pirates in any manner, whether they were archbishops, bishops, or prelates, kings or queens, dukes, marquises, or counts.

The execution of the Bull was confided to the Archbishop of Canterbury, to the Bishop of Salisbury, and to the Dean of Westminster. Its publication was directed to be made on the doors of the Cathedrals of Canterbury, Westminster, Salisbury, Nantes, Léon, Tréguier, and of the Church of St. Peter Port, Guernsey.

It should be noted, of course, that the privilege of neutrality is not founded upon the Bull. The document only implies that the Pope lent his aid to render effective the arrangement which had been arrived at for the protection of the islanders by the sovereigns concerned.

On a petition from the islanders, Duke Francis of Brittany, by Letters Patent, dated from Rennes the 20th November 1484, accepted the principle of the neutrality of the islands, and ordered the Bull to be published in his dominions.

Similarly, three years later (on May 14, 1487), Charles VIII. of France acknowledged the Bull, and directed that his Letters Patent to that effect should be published in the towns of Honfleur, Barfleur, Valognes, Cherbourg, Barneville, Coutances, Coutainville, Granville, Mont St. Michel, Genêts, and in other places in his realm.

Violation of Neutrality.—The neutrality of the islands was often violated. The records afford many instances, one or two of which may be cited.

In 1482 the King of France had to intervene for the restitution of a Guernsey vessel, seized and taken into the port of Lantriguer.

In 1523, during the war between England and France, a Guernsey vessel was captured in the Channel by a privateer of Morlaix. The Count of Laval, Governor of Brittany, directed the magistrates of Morlaix to

[1] Rymer's *Fœdera*, 2 Ric. iii.

[2] It is printed at length in Falle's *History of Jersey*, Durell's edition 1837, pp. 232–41.

hold an inquiry and to order the restitution of the vessel, if the owner showed that he was merely trading as a neutral. It is stated in the order that the King of France had declared that the islanders should be protected provided they remained neutral:

> Le plaisir du Roy notre Souverain Seigneur avoit esté desclaré que lesdits Insulaires et leurs biens ne seront de guerre, moyennant qu'ilz fussent demeurez en neutralité.[1]

An Act of the States of Jersey of October 8, 1524, passed in the presence of the Governor (Sir Hugh Vaughan) and some Royal Commissioners then sitting in Jersey, informs us that a prize made by one Denys Pointy within the seas of the Channel Islands was declared to be illegal, in conformity with the privilege enjoyed by the islanders, and Pointy was ordered to make restitution of the vessel:

> Il est regardé de par Monsr. le Capitaine et les Commissaires, messieurs la Justice et tous les Estats de l'Isle et Communaulté que une certaine prinse faette par Denys Poynty est trouvé estre de nulle valleur au contenu de nos privileges confirmés de par la bonne grace du Roy et par consequent leur est chargé de rendre ladite prinse.

Under the Tudors. — In 1528 Henry VIII. requested the King of France to acknowledge anew, and to proclaim, the neutrality of the islands. Du Bellay, the French Ambassador to England, in a letter to Montmorency dated June 30 of that year, says:

> The King and Wolsey wish a confirmation by France of the privilege of the isles of Grenesey—a sort of neutrality which they obtained long ago from the Pope; such a confirmation was made by Louis XI.[2]

In 1558 the privilege was curiously turned against the islanders by Queen Mary. She pleaded the neutrality of the islands in wars between England and France to repudiate liability for contributing towards their defence. An attitude quite characteristic of a Tudor sovereign!

The following excerpt from the Charter granted to the islanders by Queen Elizabeth, in 1561, shows how the privilege of neutrality was regarded at that period:

> And whereas some other privileges . . . were graciously granted and confirmed from time immemorial by our progenitors and predecessors, formerly Kings of England and Dukes of Normandy, and others, to the said islanders, and which have been used and observed constantly in the said islands and other maritime places; one whereof is, that *in time of war* the

[1] Falle's *History*, *op. cit.*, pp. 241–3.

[2] State Papers, For. and Dom. Hen. viii., vol. iv, part ii, No. 4440.

merchants of all nations, whether aliens, friends, or enemies, could and might freely, lawfully, and without danger or punishment, frequent the said islands and maritime places with their ships, merchandise, and goods, as well to avoid storms as there to conclude or finish their lawful business, come to, resort unto, go to and fro, and frequent the same, and there exercise their full commerce, trade, and traffic, and afterwards securely, and without danger, remain there and depart away from thence, and return unto the same, when they think fit, without any harm, molestation, or hostility whatever to their goods, merchandises, or persons; and this not only within the said islands and maritime places, and all around the same, but likewise at such places and distances from the island *as the sight of man goes to or the eye of man reaches*; We, by virtue of our Royal authority, do, for ourselves, our heirs and successors, renew, confirm, and graciously grant the same immunities, liberties, and privileges just now mentioned, etc. etc

This Charter was directed to be published throughout the realm. All transgressors were to be severely punished, and compelled to make full restitution and satisfaction of all costs and damages.

In 1586 four French vessels had been seized by the Governor of Guernsey (Sir Thomas Leighton). The Royal Court of Guernsey ordered their release, but the Governor refused to obey the judgment of the Court. The matter was referred to the Privy Council, which ordered the Governor to release the vessels. The case will be found in the *Acts of the Privy Council of England* (New Series), vol. xv., p. 128.

A letter to Sir Thomas Leighton: (Governor of Guernsey). Whereas John de Vic was sent to their Lordships from the Bailiff and Jurates of that Isle to acquaint their Lordships with their proceedings in the arrest of certain French shippes there, wherewith they found themselves grieved, as with a matter that they pretended was prejudiciall to their ancient privileges and liberties, etc.;

Their Lordships thought fitt to require the opinion of Sir Amias Poulet for the usages, who sett downe the same to have heretofore been that all merchantes strangers had from time to time been receaved within the Isles of Jersey and Garnesey in safetie, free from arrestes both of their lives, shippes, and goodes; and touchinge the expediencie, for that the publick benefit that both the Crownes of England and France did receave in time of hostillitie or unkindness by continuynge the said Isles in a kind of neutrallitie to serve for a place of common vent for both the said Realmes was sufficientlie knowne, it seemed great reason that (such consideracions continuynge still) their priviledges grounded uppon the same should likewise be still mainteined and continued: their Lordships therefore thought meet that all the shippes and goodes of the French of late by him arrested should presentlie be released, so as like release were made by the French of such shippes and goodes as were arrested by them pertaininge to the said Isle, and that hereafter he should forbeare to proceed to the makinge of anie other such arrest to the prejudice of their said priviledges, and consequenthe of the

whole state of the Isle; nevertheles because it was withall found necessarie that such strangers as should hereafter in time of restraınte or hostıllitie trade or have accesse thither should do the same under the licence of the Captain of the Isle, their Lordships also thought meete that uppon lıke restraint or other cause of unkindness notıce be thereof gıven to the subjectes of such Prınces whom ıt might concerne, to th' end they might accordınglie requıre his licence

Notwithstanding this order, a similar case occurred in Guernsey in 1594. The vessel was released by order of the Council.[1]

In 1602, under the Governorship of Sir Walter Ralegh, the question of the neutrality of the islands came up for discussion. The following minute appears on the Rolls of the States, under date 21st June of that year:

La neutralıté ancienne de laquelle ceste Isle a rejoui sous la faveur des Roys estrangers en temps de guerre, est reminse à la venue de Monseigneur notre Gouverneur pour avoir son bon Conseil et son authorité, en l'expedition d'une chose si necessaire

The only further reference in the Rolls of the States to the subject is in a letter to the States from Ralegh, dated April 29, 1603, from which it would appear that negotiations were being carried on with the French Ambassador in London.

Camden mentions the privilege, though in error he makes it apply to Guernsey only.

Veteri Regum Angliæ privilegio, perpetuæ hic sunt quasi induciæ; et Gallıs, aliisque, quamvis bellum exardescat, ultro citroque huc sine periculo venire, et commercia secure exercere, licet.[2]

Selden and Other Authorities.—Selden introduces the privilege as an argument in support of the dominion of the English sovereigns over the narrow seas:

Neque sane facile conjectandum est, undenam originem habuerit jus illud induciarum singulare ac perpetuum, quo Cæsareæ, Sarniæ, cæterarumque insularum Normannico lıtori præjacentium incolæ, etiam in ipso mari fruuntur, flagrante utcunque inter circumvicinas gentes bello, nisi ab Angliæ Regum Dominio hoc Marino derivetur.[3]

Dr. Peter Heylin, who accompanied, in 1629, the Earl of Danby to

[1] Tupper's *Hıstory of Guernsey* (1876), p. 499.
[2] *De Insulis Britannicıs*, p. 855.
[3] *Mare Clausum* (1636), Lıb. ii, ch. 19 and 22.

the islands as his Chaplain, and who wrote a *Survey* of the islands, described the privilege of the islanders as follows:

By an ancient priviledge of the Kings of England there is with them in a manner a continuall truce; and lawfull it is both for French men and for others, how hot soever the war be followed in other parts, to repair hither without danger and here to trade in all security.[1]

In a book printed at Rouen in 1671, *Les Us et Coutumes de la Mer*, the author, speaking of prizes taken at sea, remarks that a prize is not good

Si la prise a esté faite en lieu d'asile ou de refuge, comme sont les Isles et mers de Jersey et Grenesay en la coste de Normandie, ausquelles les François et Anglais, pour quelque guerre qu'il y ait entre les deux couronnes, ne doivent insulter ou courre l'ung sur l'autre, tant et si loing que s'estend l'aspect ou la veüe desdites Isles.[2]

John Poingdestre (Lieutenant-Bailiff of Jersey), a fellow of Exeter College, Oxford, writing about 1680,[3] cites the case of three Jersey merchants which came before the Parliament of Brittany in 1614. They pleaded that these islands had the privilege "*de rester neutre pendant les guerres d'entre les deux Royaumes.*"

The same author also cites the case of a bark, laden with goods from St. Malo for a Jersey merchant, which was seized in the port of St. Aubin. The Court ordered its release

for many reasons and especially for this of neutrality, forasmuch (sayd the Act) as it is not lawfull by our Priviledges—confirmed by our most bountifull King—for any of his Captaines or other his subjects to take anyone whether friend or foe about these isles, as farre as man's sight can extend itself.

Poingdestre adds that

during the warre about the Isle of Rhee & Rochelle the merchant hosiers came from as farre as Rouen & Paris to Jersey and Guernesey, & there bought & openly conveyed awaye a greate number of bales of stockings without any hindrance; & that not once but many times.

This privilege of neutrality came to an end in 1689 during the war with France, as the following extract from the Order in Council (dated August 8) shows:

Whereas on the 30th May last, His Majesty in Council was pleased to order that Their Majesties' proclamation bearing date the 14th of the same

[1] *Survey of the Estate of Guernzey and Jersey*, by Dr. P. Heylin, 1656, p. 300.

[2] Part iii., Art. xxi., s. 6.

[3] *Cæsarea, or a Discourse of the Island of Jersey* (published by the Société Jersiaise), p. 58.

month, for prohibiting the importation of any commodities of the growth or manufacture of France, should be forthwith sent to the Bailiff and Jurats of the Islands of Jersey and Guernsey, who were thereby required to cause the said proclamation, then sent unto them, to be published and strictly observed and put into execution. His Majesty in Council is this day pleased to declare that (being at this time strictly obliged in his treaties with his allies and Confederates to prohibit in all his dominions all trade and commerce whatsoever with France), he does not think it fit or expedient to dispense with the execution of this said order in this present and extraordinary juncture of time; yet it is not the intention of His Majesty in any manner whatsoever to revoke or infringe upon any privileges that may have been granted by his royal predecessors to the inhabitants of the said island of Guernsey [*sic*].

The islanders seem to have borne the attack on their privileges patiently. They had already tasted the benefits of privateering in the days of Sir George Carteret, and found that neutrality was a check upon their chances of making fortunes. For many years the Jersey and Guernsey privateers became the terror of the seas.

SOME RECENT WRITERS ON CRIMINAL LAW.[1]

[*Contributed by* PROFESSOR COURTNEY KENNY.]

MR. G. GLOVER ALEXANDER, whose extensive services as a deputy for County Court Judges have established his reputation in the North of England as a master of the civil branches of our law, exhibits, in the book whose title is subjoined, his equally thorough familiarity with the working of its criminal branch. Nine years ago, a preliminary sketch of it was published by him in an attractive little duodecimo of 150 pages, whose sound sense and unusually readable style rapidly won for it popularity. When a new edition became necessary, he wisely took the opportunity of expanding it into a fuller form, suitable for a more extensive circulation. To this he has now added a supplement, covering the changes that have meanwhile taken place. The result lies before us in an octavo volume of some 250 pages. Although written with technical precision, it is not a mere professional manual, but a bright and comprehensive survey of the operation and

[1] *The Administration of Justice in Criminal Matters (in England and Wales)*. By G. Glover Alexander, M.A., LL.M. Cambridge University Press, 1915; with Supplement of 1919. *The Principles of the Law of Crimes in British India*: Tagore Law Lectures. By Syed Shamsul Huda. Butterworth & Co., London. *Draft Code of Criminal Procedure of China.* Translated by F. T. Cheng. Published by the Ministry of Justice, Peking, 1919. *South African Law Journal* for November 1919 and February 1920. Juta & Co. Ltd., CapeTown. *Columbia Law Review*, March 1920. New York.

the spirit of English Criminal Law; intelligible and interesting even to the general reader, and calculated to be especially welcome to anyone entering upon the dignity of a Justice of the Peace, or upon the drudgery of a law student. To foreign jurists desirous of obtaining a bird's-eye view of our penal system, its pages will be invaluable.

Mr. Alexander's arrangement is as neat as his expositions are clear. He begins by explaining (1) the position of Justices of the Peace, and the various proceedings of the Petty Sessions held by them; and then treats of (2) the several higher Courts in which indictable offences are normally dealt with. By a useful addition to his earlier volume he gives (3) an account of the Executive in relation to crime. His final section discusses (4) recent legislation and recent criminal statistics—the latter topic offering a mass of instructive material to which the writers of our textbooks on penal law have usually shown an apathetic indifference.

Should Mr. Alexander's graver researches and his professional exertions leave him leisure some day to add to this book a counterpart, describing in a similarly attractive way the administration of justice in our civil courts, that new volume is sure of a hearty welcome not only from law students but also from a far wider circle of thoughtful readers. For nothing can be more important to an English citizen than to understand the outlines of the systems of civil and criminal procedure which have been evolved by centuries of experience in England.

The Code of Criminal Procedure which China is proposing to adopt affords a striking instance of the better side of Western influence upon Eastern communities. Optimistic as were Jeremy Bentham's jural and political anticipations, he can little have expected that, within a century of his death, some of his "felicific" proposals would be debated at Peking by the rulers of the Flowery Land, and that that land would then be a Republic. The present translation of this Draft Code is the work of a Chinese member of the English Bar, Dr. Fatting Tinsik Cheng, formerly of the Chinese Legation in London, and now a Judge of the Supreme Court. It manifests a good command of our language. There is, however, something quaintly archaic in his terming an offender who is caught *in flagrante delicto* "a flagrant offender" (Arts. 202, 203); for surely that adjective now has merely the wide indefinite sense of "heinous." Crabbe's "flagrant felon, from his floggings sore," had, in all probability, not been caught whilst committing his felony. Probably the printer alone is responsible for such slips as "finger frint" (Art. 218) and "anatomatical examination" (Art. 121) and "Buddist" (Arts. 127, 153), and "truefully" (Art. 184); although scarcely for "facts confided *in* a person" (Art. 153), and "a joint-offender *to* an offence" (Art. 194), and "an accused *to* the offence of theft" (Art. 194).

The Draft contains 515 articles; arranged in six parts. These are:

(1) General Provisions, (2) Proceedings in Courts of First Instance, (3) Appeals, (4) Rehearings after the Final Judgment, (5) Special Procedures, (6) Execution of Judgments. The first five were published in 1912: the sixth not until May 1919. The Courts concerned are—the Local Court, the District Court, the High Court, and the Supreme Court. The last-named is not solely a Court of Appeal, but in cases of grave political importance may be the Court of First Instance.

The rules of procedure contain many points of interest to Western jurists. To their individualistic habits of thought, for instance, the Oriental closeness of family ties has a startling novelty when we find a judge, or a public prosecutor, disqualified from acting if either party to the litigation be "related to him by blood within the fourth degree, or by marriage within the third degree" (Arts. 28, 39). Yet, in view of the very closeness of these domestic ties, it is curious to find that an accused "may be committed to the custody of his relatives or friends" without any security being exacted beyond their written undertaking for his appearance (Art. 113). Still more remarkably, when the execution of a sentence of death is postponed by the insanity or the pregnancy of the person condemned, he or she may meanwhile be simply "handed over to the person who is under a duty to take care of him or her" (Art. 488). It is not remarkable to find that the Code has subsequently to provide for the highly probable event of a condemned convict absconding from such lax care (Arts. 492, 504). Oriental, again, is the privilege conceded by the rules of evidence (Arts. 127, 153) against the disclosure of statements or things that have been confided to anyone "by virtue of his profession as a Buddhist, Taoist, medical practitioner, pharmacist, medicine-dealer, midwife, lawyer, or notary public"; and against the disclosure of facts (Art. 153) that may incriminate the witness "or any of his relatives, even if the relationship no longer exists." On the other hand, a recent Western invention is not only adopted, but ingeniously put to a novel use, by recognising the finger print, so familiar in our prisons, as a desirable form of signature to a document for persons who cannot write (Art. 218).

China prefers the Scottish and Continental policy of prosecution by State officials to our English theory of giving every citizen the right to prosecute. There are, however, some exceptional offences in which the officials cannot proceed except by the consent of the person wronged. As in French assize-courts, again, the tribunal trying any case of serious crime is required to find an advocate for any undefended prisoner (Art. 316). As in France, again, the examination of witnesses is conducted by the presiding judge; and the participation in it of the accused goes no farther than to request that judge to examine a witness (Art. 327). When the public prosecutor has stated his case, the first link of proof is the examination (of course by the presiding judge) of the accused

himself (Art. 333). Then follows the examination of witnesses; alike those for the prosecution and those for the defence. For the accused can request the Court to summon witnesses whose attendance he desires. A curious provision—the necessity for which is suggestive—empowers the presiding judge, when he finds a witness or co-prisoner to be timidly reticent, to send the prisoner out of court until that witness's examination has been finished; "the chief points of it" being recapitulated to the accused when he has been brought back to the court again (Art. 342). The final speech is always to be that delivered on behalf of the accused (p. 344). Every conviction carries with it the obligation to pay the costs of the proceedings (Art. 355). Not only the prisoner, as in England, but the prosecution also, has a right of appeal, and even of ulterior appeal (Arts. 357, 388). The prisoner has also, in extreme cases, the further right of applying for a new trial (Art. 444). On such applications, the prudent English precaution of discouraging unnecessary appeals by making an appeal delay the commencement of a sentence of imprisonment, and by making it possible for an appeal against a sentence to result in increasing it, is not followed (Arts. 450, 456). And such an application may even be made after the prisoner's death, to vindicate his reputation (Art. 455). No sentence of death can be carried out until it has been referred to the Ministry of Justice, and there confirmed (Art. 482). The death penalty must be inflicted in the strictest privacy (Art. 484): a provision usually admirable, but perhaps ill-adapted to China's present stage of development.

The draftsmen of this proposed Code of Procedure have unquestionably done their work well. They reflect credit upon whatever Western trainings they may severally have received. The policy underlying many of their provisions, and the terse definiteness with which all their provisions are expressed, suggest that that training was oftener obtained in the Quartier Latin than in the Inns of Court. How far their excellent paper-project will be carried into operation by an equally excellent officialdom remains to be seen. But they must not be disappointed if, until the world has actually seen it, foreign merchants and miners and manufacturers remain reluctant to relinquish their treasured privileges of Exterritoriality.

The grave importance attaching to the due trial of offences which, like sedition and treason, strike directly at the existing foundations of public order, is recognised in this Code by giving to the Supreme Court (which is too dignified to deal with ordinary cases except as a tribunal of appeal) a jurisdiction of first instance in case of any offence against the security of the State (Art. 6). The draftsmen's actual experience has probably led them to realise the public evil of "Political Crimes" more vividly than does a recent writer in the *Columbia Law Review*. In the issue of that important American periodical for March 1920,

Mr. Robert Ferrari, of New York, calls the attention of his compatriots to the fact that the question of Political Crimes, and of their claim to lenient treatment, has suddenly become in the United States a matter of practical importance. Of leniency towards them he is a pronounced advocate; desiring to see the offenders not only protected from extradition by foreign nations to the country whose peace they have disturbed, but also treated with a large measure of special indulgence in that country itself. He cites from Vidal, with approval, a eulogium of the political criminal as "a friend of the public good, a man of progress, who hastens the onward march of humanity." Hence he is delighted with the "enlightenment," "the great advance," manifested recently by a judge in New York City; who, in sentencing one of these friends of the public good for having hastened the onward march of humanity by forging a passport, refused to impose on him any severer penalty than a small fine, because of his motives having been political. Mr. Ferrari's point of view leads him, moreover, to desire the word "political" to receive a very wide and comprehensive scope; so as to extenuate any acts which may trouble the political order, not only directly, but even indirectly, and, moreover, even acts that are aimed, not against a country's political institutions at all, but only against its social or industrial conditions. "To-day . . . members of the State see that it is not the political State that is their enemy, but the industrial."

It is a commonplace to say that every crime must contain two elements, both a physical and also a mental one. It is equally a commonplace to say that criminal punishments are created for two purposes, that of Deterrence and that of Retribution. Mr. Ferrari considers that, in the case of the political criminal, the mental element of his offence is so little blamable that Retribution is little called for. But it must be remembered, on the other hand, that few physical acts produce wider suffering, and therefore call more loudly for Deterrent penalties, than do acts which are aimed at sapping the general public order of a nation.

That mental element, just now mentioned, forms the subject of two copious contributions to the *South African Law Journal*, in which Mr. H. D. J. Bodenstein investigates the history of the development of the doctrine of criminal *Mens rea* in Roman and in modern law. His articles embody a vast accumulation of learning. Whether it has been brought together by first-hand research, or at second hand, we have no means of judging; though the fact that he always refers to the Angelic Doctor by the appellation, unfamiliar to English eyes, of "Thomas ab Aquino" rather suggests the latter alternative. But in either case the articles will be found by his readers to be extremely valuable for future reference. He aims at establishing the proper distinction between the two alternative forms of *Mens rea*—*Dolus* and *Culpa*. That distinction he formulates in the simple test, "Whether the offender,

with the forbidden effect before his eyes, proceeded to execute his purpose *without* the conviction that the effect would *not* ensue." Throwing thus the whole stress upon the psychological facts really present in any given case, he naturally condemns as "pernicious" the legal presumption, adopted by English Courts, that a person is, *prima facie*, to be regarded as having actually intended those consequences which his conduct would naturally produce. But it must be remembered that in practical life *non apparere est non esse*. Men are not all alike; but the needs and hurries of daily business often drive the law to the rough expedient of treating them as if they all were alike.

In primitive law, a man who caused a forbidden event was indiscriminately made to suffer from it, whether he had caused it by mere accident (*casus*) or not. Later on, it was realised that punishment is only justified in case of guilt (*Reatus, Mens rea, Verschuldung*). This conviction soon led to the refinement of distinguishing between two forms of *Mens rea*—viz. Intention and Negligence, or *Dolus* and *Culpa*, or, in Dutch phraseology, *Opzet* and *Schuld*. The second-named state is that of a man who acts either without due Care as to his conduct, or without due Foresight as to the possible results of his conduct. The classical Roman jurists were familiar with this distinction. Mr. Bodenstein might fitly have reminded his readers of Paulus' familiar definition of *Culpa:* "Quod, cum a diligente providen poterit, non esset provisum" (Dig. 9.2.31). But in Germany even the jurists of the Middle Ages did not draw it clearly, until it was taught them in the fourteenth century by the Italian revivers of the Roman Law.

Yet even the learned writers quoted by Justinian had not pushed their psychological analysis to the degree of minuteness needed for defining the three alternative phrases—*Casus, Culpa, Dolus*—with such precision as to make it possible to apply them with certainty to each of the innumerable cases of injury which the experience or inventiveness of successive generations of lawyers gradually accumulated. Hence those generations multiplied conflicting definitions; which they defended or attacked in a copious literature of verbal disputes, akin to those lectures of John Austin's which form so invaluable and so repellent an education in legal precision of diction. By that literature, says Mr. Bodenstein, the Italian Post-Glossators created our modern theory of Criminal Liability. He summarises the course of their controversies in a form convenient for English readers. He doubts whether even the Romans themselves were always consistent in their conception of *Culpa*. For whilst their general rule was to hold everyone liable for such evils as he could and ought to have avoided, instances of exceptional leniency are to be found in the Pandects, in which an offender is excused because, although he did foresee the risk of harm that he was running, he did not cause this harm wilfully.

That mighty commentator Bartolus established the fundamental rule that *Culpa* can only exist where the man, by due care, could have anticipated the evil result of his conduct. The canon lawyers had, long before, gone beyond this in one case, by making a man responsible for all consequences, however unforseeable, of his act, whenever that act was in itself unlawful. This canonical rule was, by Lord Coke's influence, engrafted upon the English law of manslaughter. Thus, at the Central Criminal Court, in April last, a surgeon was held guilty of manslaughter when a woman, on whom he was performing an unlawful operation, died under it from no physical injury at all but from an utterly improbable cause—mere mental shock.

The Roman conception of Intention (*Dolus*) was limited to what the Germans called "Direct Intention"; viz. where the evil result was not only foreseen, but also desired. It is often said that the Italian revivers of the Roman Law extended *Dolus* to cover all cases of foresight, even those "Indirect Intentions" where the evil consequence thus foreseen as possible was not desired, but only risked. Mr. Bodenstein, however, holds that it was not they who introduced this extension of the word. It is true that a man who had merely foreseen, and even one who merely ought to have foreseen (but did not), the evil consequence, was punished by them as severely *as if* he were guilty of *Dolus—i.e.* as if he had both foreseen and really desired that consequence—but they did not speak of him as actually guilty of *Dolus*. Their wide principle of punishment he exemplifies from the South African "Native Territories Penal Code," which (Art. 140) makes a homicide be a murder whenever the offender "does, for any unlawful object, an act which he knows, or *ought to have known*, to be likely to cause death." For, as the Pandects say, "Culpa dolo proxima dolum repræsentat" (Dig. 47.4.1.2).

A Spanish lawyer of the sixteenth century, Govarruvias, following the psychology of the mighty Aquinas, comprised under Intention all cases in which the foreseen consequence was more likely than not to happen; *i.e.* when it was a consequence that followed in even a bare majority of instances. Thus he introduced a *voluntas Indirecta*; and, moreover, one of varying degrees of indirectness, according to the greater or less probability of the evil result. But whilst, unlike the Italians, he denominates these cases as forms of "Intention" (*Dolus*), he, again unlike the Italians, refuses to punish them with the same severity as cases of Direct Intention (*i.e.* of Foresight combined with Desire). This definition, says Mr. Bodenstein (though with the qualification that indirect and direct intention were to be punished equally), was adopted by the German jurist Carpzovius—or, by lineage, Carpesano—whose influence carried it into the legal vocabulary not only of Germany but also of England.

Mr. Bodenstein shows how modern German and Dutch writers distinguish between the cases where undesired consequences are foreseen

as merely possible, and those where they are foreseen as inevitable. The latter kind he well exemplifies by cases "where (i) the commander of a submarine orders a torpedo to be launched against a ship, foreseeing that the explosion which is to follow must inevitably kill some of the crew, his wish, however, being merely to sink the ship but not to kill; or where (ii) a nurse who notices that a patient's bandage does not stop the bleeding, yet (though knowing for certain that if no help is forthcoming the patient will bleed to death) abstains from warning the doctor, and the patient, against her wish, dies." In cases of this class, even the undesired consequences are now generally regarded on the Continent as "intended" (though only "indirectly"). Nay, even where those consequences are only foreseen as mere possibilities, there is still said to be "Intention"; (except where the offender concluded that in his particular instance this possibility would not occur, and he consequently is said to be guilty of nothing more than *Culpa*). For even if a person does not desire his conduct to produce some of the evil results which he foresees as possible, yet the foresight of their possibility ought to have stayed his hand. If it does not, he cannot fairly allege that he did not "intend" them. But their form of Intention is distinguished as merely "Eventual"; (except when the man would have carried out his purpose even though he had foreseen the consequence as not merely possible but inevitable, for then his guilt is as great as if he had actually thought the consequence to be inevitable).

Nevertheless, as Chief Justice Brian long ago insisted, even the devil himself cannot read the thoughts of man; so how shall a merely human tribunal determine which of all these various states of mind to impute to an offender whom it is trying? Surely, in the first instance, only by the current English rule that a man must *prima facie* be presumed to have intended the natural consequences of his conduct. Mr. Bodenstein denounces that presumption as "pernicious." But since it is identical with what he himself pronounces to be the only way of getting at an offender's state of mind, one must suppose that he has fallen into the exaggeration—not at all uncommon—of supposing this presumption to be always an absolute and irrebuttable one.

What he considers to be a pernicious presumption is pronounced by an Indian lawyer to be "a self-evident proposition" (p. 196). This Indian jurist, Syed Shamsul Huda, outlines the whole range of the penal laws of British India in a thin volume of large print; which stands in sharp contrast to Mr. Bodenstein's minute and meticulous investigation of a single legal topic. The Oriental writer makes a reflection which may have also passed through the minds of some of the less careful and less grateful of Mr. Bodenstein's readers—"Attempts to define elementary ideas with scientific precision often lead to failure, and (what is still worse) to confusion" (p. 35).

These thirteen simple lectures by Mr. Huda are written in a clear and bright style which cannot have failed to arouse the interest of the youths to whom they were addressed. He manifests in them much shrewd common sense and a logical accuracy of reasoning; as well as a ready faculty of illustrating his meaning by terse imaginary examples. His book may be commended to all who, whether in India or in England, desire to get a general idea of the drift of Anglo-Indian criminal law.

STATE IMMUNITY IN THE LAWS OF ENGLAND, FRANCE, ITALY, AND BELGIUM.

[*Contributed by* PROFESSOR F. P. WALTON, LL.D.]

WHEN a rule of law framed to suit the practices and ideas of one period of society has to be applied in a period in which widely different ideas and practices prevail, the result may be unsatisfactory. The case of *Bainbridge* v. *Postmaster-General* ([1906] K.B. 178; 75 L.J.K.B. 366) suggested forcibly that the old rules of the English law that the Crown cannot be sued in tort, and that the head of a Government department is not responsible for the wrongdoing of his subordinates, were rules not suited to modern requirements. It was held there that an action did not lie against the Postmaster-General in his official capacity for damage caused to the plaintiff by the negligence of a subordinate official. If the Post Office had been a private undertaking, the official would have been a "servant." But surely the rule that "the King can do no wrong" is out of date now that the King (or the State) is a conductor of enterprises like the Post Office. The King (or the State) is no longer merely a ruler; he is at the same time a trader.

The Porto Alexandre.—The recent case of *The Porto Alexandre* ([1920] P. 30) enforces the same moral in the sphere of international law. The rule that the property of a foreign Sovereign State is immune from arrest may lead, as it did here, to an inequitable result when it is applied to a foreign State which is acting as a trader. A Portuguese ship ran aground on the mud in the Mersey, and was got off by Liverpool tugs. A writ was issued against the ship for salvage. It turned out that the ship belonged to the Portuguese Government, and was employed in carrying cargo for private traders, the freight being paid to the Portuguese Government. The foreign Government moved to set aside the writ on the ground that the property of a foreign Sovereign State is immune from arrest, and the Court of Appeal, affirming the decision of the Court below, gave effect to this contention.

Lord Justice Scrutton suggested that the Portuguese Government ships must not be surprised if they were left upon the mud. If that were

all, the result would be tolerable. But, unfortunately, a ship in distress does not generally bear evident marks of its ownership. Moreover, when salvage services have to be rendered, lives are generally at stake as well as property. Our sailors are willing to risk their own lives to save others without expecting reward. But when they save property they expect to be paid for their services.

As was pointed out in letters to *The Times* (November 26 and December 16) by Mr. J. B. Aspinall, it is putting an undue strain on human nature to call on sailors to risk their lives to save *property* with no certainty of getting any remuneration.

The decision is clearly in accord with precedents, but it is none the less contrary to the sense of justice.

Immunity of Foreign Sovereigns.—So is, in my opinion, the rule of the English law that a foreign Sovereign is not liable to be sued in an English court in respect of acts done by him in England in his private capacity. Who, except the defendant, can be satisfied with the decision in *Mighell* v. *Sultan of Johore* ([1894] Q.B. 149, 63 L.J.Q.B. 593) ? The plaintiff set out that a man going under the name of Albert Baker had promised marriage to her in England and had broken his promise, and she claimed damages. The defendant pleaded that he was a Sovereign, who for private reasons had called himself Albert Baker. The Court held it had no jurisdiction. It may be interesting to compare briefly the English law on the subject of the immunity of the State, and as to the immunity of a foreign State, with the laws of some other countries, and more particularly with the French law.

French Law.—As regards the right of the citizen to sue his own State, French law and Continental law generally, are much more liberal than English law. The State can be sued in contract or in tort, or upon a quasi-contract. It is true that the action must be brought (subject to certain qualifications) in the administrative courts, but the remedy exists, and, in point of fact, the administrative Courts are singularly free to decide on equitable grounds. (See Jèze, in *Revue de Droit Public*, 1915, p. 23.) In many cases actions based on quasi-contract have been successfully brought against the State. (See *Cass.* 6 *juin* 1893, Sirey, 95.1.185 ; Hauriou, *Droit Administratif*, 8th ed., 479.) In particular, a claim may be made in France for salvage services rendered to a ship belonging to the French Government. (*Conseil d'État*, 14 *juin* 1907, D. 1908.3.125.) The French law distinguishes between the State exercising its sovereign authority in performing an *acte de gouvernement*, and the State carrying on, through various departments, the administration of the country. In regard to all matters arising out of this administration there is no immunity. (See some illustrations in my article in the *Juridical Review*, 1919, p. 225.) If the case of *Bainbridge* had come before the French Court, it would have been decided the other

way. And, I think, the same may be said of the case of the Sultan of Johore. The Court of Paris has held that an action was competent in France against the Queen of Spain for the price of diamonds bought by her in France for her private use. (*Paris, 3 juin* 1872, Dalloz, 72.2.123.) The same Court held itself incompetent to entertain an action of damages brought by a Frenchman against the Emperor of Russia, in respect of an alleged arbitrary act of the Russian Government. (*Paris, 23 août* 1870, Dalloz, 71.2.9.) This distinction between the personal act of a Sovereign and an official act is approved of by most Continental authorities. (See, *e.g.*, Aubry et Rau, 4th ed. 8, S. 748, *bis*, p. 141; Baudry-Lacantinerie et Houques-Fourçade, *Des Personnes*, 1, n. 658; Weiss, André, *Traité de Droit International Privé*, 2nd ed. 5, p. 84; Despagnet et de Boeck, *Précis de Droit International Privé*, 5th ed., n. 179, pp. 559 et seq. See, however, Valéry, *Manuel de Droit International Privé*, p. 73.)

But can we make any such distinction between the State as an administrator or a trader, and the State as a Sovereign when the defendant is a foreign State?

The point which the English Court dealt with in *The Porto Alexandre* has been much discussed on the Continent of Europe. (See, for a review of the earlier writers, Bar, *Private International Law*, Gillespie's ed., pp. 1101, et seq.)

In France many writers of reputation support the affirmative. (Baudry-Lacantinerie et Houques-Fourçade, *Des Personnes*, 1, n. 657; Despagnet et de Boeck, *Précis de Droit International Privé*, 5th ed., n. 179; Weiss, A., *Traité de Droit International Privé*, 2nd ed. 5, p. 108.)

Resolutions of the Institut de Droit International.—The Institute of International Law, at its meeting of 1891 at Hamburg, adopted a number of resolutions based upon this distinction. They were proposed in the report of von Bar:

Les seules actions recevables contre un État étranger sont:

1. *Les actions réelles, y compris les actions possessoires, se rapportant à une chose immeuble ou meuble, qui se trouve sur le territoire;*

2. *Les actions fondées sur la qualité de l'État étranger comme héritier ou légataire d'un ressortissant du territoire ou comme ayant droit à une succession ouverte sur le territoire;*

3. *Les actions qui se rapportent à un établissement de commerce ou industriel ou à un chemin de fer exploité par l'État étranger dans le territoire;*

4. *Les actions pour lesquelles l'État étranger a expressément reconnu la compétence du tribunal, l'État étranger, qui lui-même forme une demande devant un tribunal, est reputé avoir reconnu la compétence du tribunal, quant à la condamnation aux frais du procès et quan tà une reconvention résultant de la même affaire qui est le sujet de la demande; de même l'État étranger qui, en répondant à une action portée contre lui, n'excipe pas l'incompétence du tribunal, sera reputé en avoir reconnu la compétence;*

5. Les actions fondées sur des contrats conclus par l'État étranger dans le territoire, si l'exécution complète dans ce même territoire ne peut être demandée d'après une clause expresse ou d'après la nature même de l'action ;

6 Les actions en dommages-intérêts nées d'un quasi-délit, qui a en lieu sur le territoire ;

Ne sont point recevables les actions formées pour des actes de souveraineté, y compris les actions résultant d'un contrat du demandeur comme fonctionnaire de l'État, ni les actions concernant les dettes de l'État étranger contractées par souscription publique.

The French jurisprudence (*Annuaire de l'Institut de droit international*, 1889–92, p. 436), however, does not go nearly so far. It does not admit the possibility of distinguishing between acts of a foreign State which are of a sovereign nature and acts which are of a private or commercial nature. The Courts hold themselves incompetent unless the suit relates to immovables in France, or unless the foreign State submits to the jurisdiction. The two principal cases are Cass. 22 janv. 1849, Sirey, 49.1.81, Dalloz, 49.1.5 ; and Paris, 14 déc. 1893, Dalloz, 94.2.421. The second case is interesting chiefly as affirming the doctrine that the incompetence of the French Court is not a matter of public order, and, therefore, that the action can be entertained if the foreign Sovereign submits to the jurisdiction. The first case is what English lawyers would call the leading case on the subject. The plaintiffs, traders at Bayonne, had sold a large quantity of shoes to the Spanish Government for the use of its troops, and to ensure payment had executed a *saisie-arrêt*, *i.e.* had attached debts due by French debtors to the Spanish Government. The *Cour de Cassation* held that the seizure was null, and laid down the principle in the broadest terms:

Attendu que l'indépendance réciproque des États est l'un des principes les plus universellement reconnus du droit des gens ; que, de ce principe ; il résulte qu'un gouvernement ne peut être soumis, pour les engagements qu'il contracte, à la juridiction d'un État étranger ; Qu'en effet, le droit de juridiction, qui appartient à chaque gouvernement pour juger les différends nés à l'occasion des actes émanés de lui, est un droit inhérent à son autorité souveraine, qu'un autre gouvernement ne saurait s'attribuer sans s'exposer à altérer leurs rapports respectifs.

But it will be observed that in this case the contract was for army equipment. Such a contract may well be considered as made by the State in its sovereign character. It differs widely from a liability arising from an act of ordinary civil administration or from a trading venture, such as the running of a ship for profit.

Italian Law.—So far as I can discover, the Italian Courts were the first to adopt the distinction for which so many writers have contended between the sovereign acts of a foreign State and acts by the foreign

State of a private nature. In a number of cases Italian Courts of Cassation have held that the principle of the independence of Sovereign States is not violated by the Italian Courts assuming jurisdiction over a foreign State in regard to liabilities incurred by such a State in performing acts which were not by nature governmental. [See *Journal de Droit International Privé* (Clunet), 1889, p. 335.]

Belgian Law.—The same view has been adopted in Belgium, and is admirably stated in the judgment of the *Cour de Cassation de Belgique* of 11 *juin* 1903 [Sirey, 1904.4.16, D. 1903.2.401; *Journal de Droit International Privé* (Clunet), 1904, p. 417.]

The action was by a Belgian railway company against the Dutch Government in its character as administrator of the Dutch State Railway, and was a claim for restitution of a sum of money paid under a contract. There was no question of seizure of property, and the Court of Cassation of Belgium assumes, without deciding it, that the property of a foreign State cannot be attached. It declares that, even if this be so, it by no means follows that the Belgian Courts are incompetent. If a Belgian citizen gets a judgment against the Belgian State itself, he cannot seize the State property in execution, any more than a French citizen can seize French Government property. (Berthélemy, H., *Droit Administratif*, 8th ed., p. 520.) All the same, the State pays its debts. Why may we not expect a foreign State to do the same? The moral effect of a judgment is considerable, and the public conscience in the foreign State would not allow it to repudiate its debts. But, probably, the next step will be to allow the attachment of property of the foreign State if this property is within the jurisdiction, and if it is not of a kind specially appropriated to the State's sovereign activities, such as, *e.g.*, the buildings of an Embassy or a battleship.

This step the Italian Courts have already taken in the cases previously mentioned.

Upon the general principle of jurisdiction, apart from the question as to the possibility of seizure or arrest, I cannot do better than give a part of the Belgian judgment in its own terms:

La règle du droit des gens qui proclame l'indépendance des nations, découle du principe de leur souveraineté; elle est dès lors sans application quand la souveraineté n'est pas en cause. La souveraineté n'est engagée que par les actes de la vie politique de l'État. Les actes par lesquels la puissance publique s'affirme sont régis à l'intérieur par le droit constitutionnel et échappent, à raison de la séparation des pouvoirs, au contrôle de l'autorité judiciaire; leurs effets, en dehors de territoire, ne relèvent que du droi tinternational et sont soustraits, à ce titre, à l'appréciation des tribunaux tant du pays que de l'étranger. Mais l'État ne doit pas se confiner dans son rôle politique; en vue des besoins de la collectivité, il peut acquérir et posséder des biens, contracter, devenir créancier et débiteur; il peut même faire le commerce, se reserver de monopoles ou la

direction des services d'utilité générale. Dans la gestion de ce domaine ou de ces services, l'État ne met pas en œuvre la puissance publique mais fait ce qui des particuliers peuvent faire, et partant n'agit que comme personne civile ou privée. Lorsqu'en cette qualité, il est engagé dans un différend, après avoir traité d'égal à égal avec son cocontractant, ou a encouru la responsabilité d'une faute étrangère à l'ordre politique, la contestation a pour objet un droit civil du ressort exclusif des tribunaux. Les États étrangers sont, en tant que personnes civiles et au même titre que les autres étrangers, justiciables des tribunaux belges. Pour ces États comme pour l'État belge, la souveraineté n'est pas en jeu, quand ils sont en cause, non pas comme pouvoir, mais uniquement pour l'exercice ou la défense d'un droit privé A cet égard, il n'y a pas à distinguer entre la contestation qui concerne l'exécution d'un contrat conclu par l'État étranger et celle relative à un immeuble qu'il possède sur le territoire ; il n'y a pas à rechercher non plus si l'État étranger a saisi, comme demandeur, les tribunaux de sa réclamation, s'il répond à une demande reconventionnelle, si, assigné comme défendeur, il n'excipe pas d'incompétence, ou s'il a compromis sur les difficultés à naître de la convention qu'il a souscrite. Il ne se voit pas, en effet, en quoi l'État abdiquerait sa souveraineté en se soumettant à la juridiction des tribunaux étrangers pour les jugement des conventions qu'il a librement formées et conservarait cette souveraineté intacte, lorsqu'il subit leur juridiction ou y recourt dans les autres hypothèses ci-dessus visées, pour lesquelles une doctrine et une jurisprudence presque unanimes admettent leur compétence. D'ailleurs, dans le cas de contrat comme dans les autres, il y aurait rononciation au moins implicité à l'immunité, s'il pouvait être question de renonciation en une matière qui intéressé des prérogatives inaliénables. En réalité, dans toutes les hypothèses, la compétence dérive, non du consentement du justiciable, mais de la nature de l'acte et de la qualité en laquelle l'Etat y est intervenu. Si l'État étranger peut saisir nos tribunaux de poursuites contre ses débiteurs, il doit répondre devant eux à ses créanciers.

In Egypt the Mixed Court of Appeal has expressly adopted the language of the judgment of the Belgian case in a claim as to a succession. (C. A. Alex., 9 mai 1912, *Gazette des Tribunaux Mixtes*, 2, p. 161.) The point whether a trading ship belonging to a foreign Government enjoyed immunity was raised in a case decided on May 1, 1920, by the Mixed Tribunal of First Instance at Alexandria. But it was found unnecessary to decide this question, as it was established that there had been a demise of the ship to a private company.

Conclusion.—The broad conclusion, then, is that, in deciding the question of competence, everything depends on the *nature* of the act or of the affair which created the liability. If it was a political act, the foreign Court has no jurisdiction. And by a political act we mean an act which, by its nature, could only be performed by a Government. On the other hand, if the act or the affair was one which a private individual *might* have done or been engaged in, the foreign Court is competent to entertain the suit, and that irrespective of whether or not it

has any means to enforce the execution of its judgment. It seems clear, therefore, that the highest Court in Belgium would have answered the question raised in *The Porto Alexandre* in a contrary sense. The situation may be summed up as follows:

The French jurisprudence is against the possibility of making the distinction referred to between sovereign acts and other acts. But the principal case is an old one, and the question there was as to an act which might be considered as of a sovereign character. (Cass. 22 janv. 1849, D. 49.1.81.)

In the eighty years which have elapsed since its date, there has been a decided change in the practices of States, and a consequent change of opinion on the matter among legal writers. The change of opinion among professional writers has led the Courts in Belgium, Italy, and Egypt, to adopt what may be called the new view—that is, that the foreign State as a trader has no immunity; and it is quite likely that the French Courts will abandon their former attitude. Already, in France, in cases against a foreign State arising out of its administration of a State railway, the custom is for the foreign State not to take the plea of incompetence. (See Cass. 31 mars 1874, Sirey, 1874.1.385; Cass. 12 nov. 1877, Sirey, 1879.1.349; Cass. 5 mai 1885, Sirey, 1886.1.353, Dalloz, 1885.1.341.)

English lawyers find it hard to realise that the criticism of a judgment by legal writers can induce the Courts to give up a view which has been adopted, even by the highest Court of the country. Under the French system this is perfectly possible, and it is, in fact, what has happened here.

One of the most singular arguments of those who oppose the codification of the English law is that this would tend to diminish its elasticity. In point of fact, elasticity is the virtue of the codified systems, and want of certainty is their defect. The French Courts may, if they like, abandon their former point of view, but the English Courts are bound, as the Court of Appeal was in *The Porto Alexandre*, by old decisions, and are sometimes obliged, as in that case, to decide in a sense contrary to that which they feel to be just.

THE MINING LAWS OF THE WEST AFRICAN COLONIES AND PROTECTORATES.[1]

[*Contributed by* GILBERT STONE, ESQ.]

THE mining law of the West African Colonies and Protectorates may be roughly divided into three parts: (1) The concession system of the Gold Coast Colony, Sierra Leone, and Ashanti; (2) the claim system of Nigeria; and (3) the modified claim system of the Northern Territories.

Land Tenure.—Mining Law is always and, from the very nature of the case, intimately connected with the law of real property, and it is consequently always desirable in the first place to consider the law relating to land ownership or tenure in the country in question. Here we at once find a broad distinction between Lagos on the one hand, the rest of Nigeria on the other hand, and the Gold Coast, Ashanti, the Northern Territories, and Sierra Leone; for whereas, in the general case, it may be said that ownership of land is in the native throughout West Africa under British rule, this generalisation is subject to two important exceptions, viz.: (1) Under the treaty made in 1861 with Docemo, King of Lagos, the title to the land of the Port and Island of Lagos passed to the Crown;[2] (2) by the Minerals Ordinance, 1916, s. 3 (1) it is provided that "the entire property in, and control of all minerals and mineral oils in, under, or upon any lands in Nigeria,[3] is and shall be vested in the Crown."

There is thus created a fundamental difference between the mining law in Nigeria (including Lagos) and the "Concession" law in existence in the Gold Coast, Ashanti, and Sierra Leone. In essence also the law existing in the Northern Territories approximates rather to the law of the Gold Coast than to the law of Nigeria, though superficially its provisions relative to licences and options appear more nearly to resemble the provisions of the Minerals Ordinance, 1916 (Nigeria), than the provisions of either the Concessions Ordinance, 1900, or the Mining Rights

[1] The Imperial Mineral Resources Bureau, an Imperial Chartered Association, having for its purposes, *inter alia*, the dissemination of information relative to mining, has undertaken the publication of a series of volumes upon the mining laws of the British Empire and foreign countries, each volume dealing with the law, both statutory and case, of a particular dominion, colony, administrative area, or country. The parts already in the press or published are: (i) Nigeria; (ii) the Gold Coast and Ashanti; (iii) the Northern Territories; and (iv) Sierra Leone. Parts relating to the mining law of South Africa are in course of preparation. The present article explains in outline the mining law of British West Africa, and it is hoped that it may be followed from time to time by other articles which will deal in a similar manner with the laws treated of in the future parts to be published by the Bureau.

[2] *A. G.* v. *Holt & Co., Ltd.* (P.C. Appeal No. 77 of 1911).

[3] Nigeria, of course, now includes Lagos.

Regulation Ordinance, 1905 (Gold Coast); for in the Northern Territories private property in the land and in the minerals is in the native and such rights are fully recognised, while in Nigeria, although the rights of the natives to the ownership of the surface is recognised, the entire property in the minerals, as we have seen, is vested in the Crown.

In Northern Nigeria the Governor is also given control over the surface,[1] though the ownership is in the native. Throughout Nigeria land may be compulsorily acquired by the Government for public purposes, and mining is deemed to be a public purpose.[2] There is also a statutory exception made in favour of the Crown from conveyances or leases made under the Crown Lands Ordinance of the right to enter upon land, and to search for, mine, and remove, any mineral or mineral oil.[3]

It is thus clear that in Nigeria the person desiring to mine must look primarily to the Crown. In the Gold Coast, Ashanti, Sierra Leone, he must negotiate with the native owners, but in all these districts the Crown exercises a very considerable degree of supervision over the resulting contract, and in the Northern Territories excludes the possibility of operation under a grant or demise from a native, and substitutes a mining licence (effective up to ninety years) granted by the Crown for the mining concession (effective up to ninety-nine years), granted by the native or natives having proprietary rights over the area in question obtainable in the Gold Coast, Ashanti, and Sierra Leone. In the Northern Territories it may be said, perhaps, with substantial accuracy, that the Crown in effect contracts for and on behalf of the natives, and has power to require the payment by the licencee of two sums: (*a*) to the Crown for payment to the local Treasury; (*b*) to the Crown for payment to the native or natives whose interests are affected.

To the student of primitive institutions, the land laws of the Fantis (a law which is widespread and includes most of the area, except Nigeria, of which we are speaking) opens up a fascinating territory well worthy of exploration. It is a subject outside the scope of this article, except in so far as it affects the principles of mining law; but it is necessary to remark that Fanti law knows not tenure in land. Individual (as distinct from tribal or family) ownership is rare, and by custom a transfer of land simply does not, in some districts, transfer any rights in the minerals therein. It is consequently desirable, in all the cases where the negotiations are with natives, to see (1) that the lease is made with the proper parties; (2) that the minerals are specifically included; and (3) that the liberty to search for, work, and carry away, and do all things necessary to work and get the minerals, is also expressly granted to the lessee.

In Nigeria, so far as mining law is concerned, any consideration of

[1] Land and Native Rights Ordinance, 1916.
[2] Public Lands Acquisition Ordinance, 1917.
[3] Crown Lands Ordinance, 1918.

native law and custom has merely an academic interest. The customs are diverse, for Nigeria is an artificial entity. So far, however, as the mining districts of Northern Nigeria are concerned, the native law is Mohammedan law of the Maliki school, and the provisions of the Minerals Ordinance of 1916 are consonant to the principles of that school.

In all the West African Colonies and Protectorates the doctrines of English common law, the principles of equity, and the statutes of general application up to the given dates varying with the Colony or Protectorate, have been incorporated into the local law. But as Lord Cranworth once said,[1] "Nothing is more difficult than to know which of our laws is to be regarded as imported into our colonies." The meaning of the term "statute of general application" is by no means clear. It has been discussed in various cases which have come before the Supreme Court of Sierra Leone,[2] with, however, somewhat conflicting results. The meaning of the similar term, "statutes of universal application," as used in an Ordinance of British Honduras, was glanced at but hardly determined by the Privy Council in 1889.[3] The matter is obviously one of substance when one is considering the law of a particular dominion, colony, or dependency, though in no case that has come to my notice has the general application of English law been permitted to override the specific provisions of the local legislature.[4]

With these preliminary remarks I proceed to a more detailed consideration of the mining laws of (i) Nigeria; (ii) the Gold Coast, Ashanti, and Sierra Leone; and (iii) the Northern Territories.

Nigeria.—The law relating to mining for minerals other than mineral oils is mainly contained in the Minerals Ordinance, 1916, and its amending Ordinance passed in 1918, and the Rules and Orders issued thereunder; the mining for mineral oils is controlled by the Mineral Oils Ordinance, 1914. There is some doubt as to whether the mineral oil regulations scheduled to the Mining Regulation (Oil) Ordinance, 1907, were repealed with the repeal of that Ordinance. In the opinion of the Nigerian authorities they were not. Certain substances—*e.g.* bitumen—are both minerals and mineral oils.

The Minerals Ordinance, 1916, deals *seriatim* with the following operations: (i) Prospecting; (ii) Mining; (iii) Dealing in Minerals.

Prospecting.—Prospecting may be carried on under either a prospecting right or an exclusive prospecting licence. The former gives to the

[1] *Whicker* v. *Hume* (1858), 7 H.L.C. 124, at p. 161.

[2] *Fischer & Co.* v. *Swaniker*, Hayes Redwar, p. 137; *Quartey* v. *Unger Akua*, *ibid.*, p. 138; *Adoo* v. *Bannerman*, *ibid.*, p. 139; *Cole* v. *Cole*, 1 Nigerian L.R., at pp. 20, 21.

[3] *Jex* v. *McKinney*, 58 L.J.P.C. 67.

[4] Should readers be aware of the decisions of Dominion or Colonial Courts on the meaning of statutes of general application, a communication would be appreciated by the writer.

holder a general right to prospect anywhere in the Colony, except in areas closed to prospecting or in townships, etc.; the latter permits the licencees to have the exclusive right of prospecting within a given area.

Subject to certain exceptions, anyone who is eighteen years of age and able to read may obtain a prospecting right, but he is required to pay a fee of £5, and deposit, in certain circumstances, a sum not exceeding £50 as security against any damage he may do to private property. The right lasts for one year, and gives the holder the right to obtain an exclusive prospecting licence.

The area which may be prospected exclusively in virtue of the licence is any area from one to sixteen square miles, or, in the case of an area on which precious stones have been found, a smaller area. The area must be rectangular in shape, with, as a rule, a minimum width of not less than one-third of the length. The area to be applied for must, prior to application being made, be beaconed off. Priority depends on date of receipt of the application. The applicant must deposit a sum to cover the approximate charges payable for survey, and may be required to furnish a guarantee not exceeding £200 per square mile of area, and must satisfy the Governor that he commands sufficient capital to ensure the proper prospecting of the area. The licence lasts for one year, but may be renewed up to three or six years, according to the nature of the working (alluvial or lode). A rent of £5 per annum per square mile is payable. It gives the right to prospect and erect necessary machinery for prospecting, and also to obtain the grant of a mining right or lease.

The grant of an exclusive prospecting licence carries with it the right *inter alia* to enter with agents and workmen to prospect and for that purpose to erect machinery, and also confers a limited right to the possession, retention, and disposal of the minerals obtained in the course of prospecting. The prospector is required continuously and adequately to carry on *bona fide* prospecting operations,[1] and must compensate surface owners or occupiers for interference, damage, etc.

Mining.—Mining may be carried on by virtue of the grant of either a mining right or a mining lease. A mining right will only be granted, in respect of a stream and the land lying within 100 yards of the centre of the stream, for the length of the stream not exceeding one mile. In return therefor the holder pays a rent and a royalty on the minerals gotten. The right exists for one year unless renewed, but may be terminated if the Governor is satisfied that the mineral-bearing qualities of the area or part thereof are such as to justify the holder in being called upon to take up a mining lease.

Mining leases are of six kinds: 1. Metalliferous minerals and precious metals lode leases. 2. Metalliferous minerals and precious metals alluvial

[1] *Bona fide* prospecting does not mean mere fossicking about. *O'Flaherty* v. *Simon*, 11 N.Z.M.C.R. 52.

leases. 3. Precious stones leases. 4. Carbonaceous minerals leases. 5. Earthy minerals leases. 6. Mica leases.

The area granted varies with the kind from 40 to 800 acres. The term is twenty-one years, but may be renewed. A mineral rent varying with the kind, and not usually exceeding 10s. per acre per annum, is payable in addition to surface rent, and royalties on minerals won. The royalty varies with the mineral, and in some cases with the market price in London. In certain cases export duties are also payable up to 50 per cent. of the royalty. The existing provisions relative to royalties are to be found set out in the General Minerals Regulations, 1916, the Mica Mining Regulations, 1917, and the Wolfram Royalties Regulations, 1919. The most important mineral in Nigeria is tin, and on tin and tin ores a sliding scale royalty is payable based on the London prices. Such royalty varies from 2 per cent. to 7½ per cent., and at present prices would be 7½ per cent. The rents charged are of two kinds: (1) a mining rent and (2) a surface rent. The rents are small, varying from 1s. to 10s. per acre per annum. The exclusive prospecting licencee pays a rent in respect of his area of £5 per square mile per annum. Special licences are necessary in order, in certain circumstances, to obtain water rights.

Dealing in Minerals.—No person other than those lawfully engaged in mining or prospecting operations is permitted to possess minerals, and no person may purchase minerals unless he be the holder of a licence under s. 50 of the Minerals Ordinance, 1916. Such licence may not be transferred without consent. Dealing in metals or ores which fall within the Non-ferrous Metal Industry Ordinance, 1919, is subject to similar restrictions to those imposed by the Non-ferrous Metal Industry Act, 1918.

Registration.—Mining leases, mining rights, and exclusive prospecting licences must be registered both under the Land Registration Ordinance, 1915 (as amended), and in the office of the Government Inspector of Mines.

Disputes.—Disputes are settled usually by the Executive, no special mining courts being in existence. In certain cases the dispute must be referred to arbitration, or may be either referred to arbitration or to the Supreme Court. The Governor has wide jurisdiction over mining disputes.

The Gold Coast, Ashanti, and Sierra Leone.—My remarks here apply primarily to the Gold Coast,[1] but substantially the mining law of Ashanti and Sierra Leone is the same.

[1] The reader is warned that the remarks of Mr. Alford in his *Mining Law of the British Empire*, when considering the Gold Coast, are largely wrong, owing to the fact that the author unfortunately reproduces, as a guide to prospectors, etc., in the Gold Coast, a schedule to the Ashanti Concessions Ordinance, 1903, which has no counterpart in the Gold Coast. Mr. Wegenen, in his *International Mining Law*, appears to have fallen into a similar error.

Prospecting.—Prospecting may be done by anyone who holds a prospecting licence, and may be commenced before any concession has been obtained, and in Ashanti and Sierra Leone no mining concession can now be obtained except by the holder of a prospecting licence. The licence is obtained from the Governor; it is of a non-exclusive character, is not transferable, lasts for one year, and is subject to a stamp duty of £5. The area over which the prospector may operate is wide, but in Ashanti must be delimited. As the proprietary rights in the land and in the minerals are, as we have seen, in the native, the prospector must presumably come to agreement with the persons on whose land he prospects over, or he might otherwise be liable for trespass; but the Governor assists in making such arrangements through his officers.

Mining.—Before mining can be commenced, the person operating must obtain a concession from the native or natives whose proprietary rights are affected, and must obtain a mining licence from the Governor. If the mining includes dredging on any of the rivers mentioned in the schedule to the Rivers Ordinance 1903, a dredging licence (fee £5) must also be obtained. In the Gold Coast, but neither in Ashanti nor in Sierra Leone, a special pumping licence may also, in certain circumstances, be obtained.

A concession in essence is a document evidencing a grant or demise from a native. The definition varies considerably in the various Concession Ordinances, and the definitions contained in the Ashanti Concessions Ordinance, 1903 (Revised Edition), and the Sierra Leone Concessions Ordinance, 1902 (Revised Edition), appear to require amendment in order to meet the criticisms made by Lord Shaw in the *Wassaw Exploring Syndicate, Ltd.*, v. *African Rubber Co., Ltd.*, [1914] A.C., at p. 631, on the definition contained in the Gold Coast Concession Ordinance, 1900, which has since been amended by the Concessions (Amendment) Ordinance, 1916.

The concession when granted, in order that it may be perfected and for priority to be obtained, should be (1) stamped: (2) registered under the Land Registry Ordinances; (3) certified as valid by the appropriate Court. A concession which has been certified as valid is good and effective, as against all other persons, as from the date of the certification. Certification will not be granted unless certain conditions, varying with the Colony, etc., have been complied with. The most important conditions are that the proper parties must have granted the concessions, that adequate consideration must have been given, that the term must not exceed ninety-nine years, and native interests as to cultivation, game, etc., must be adequately protected. If these conditions are not complied with, the Court may refuse certification, or in certain cases, *e.g.* where the term exceeds ninety-nine years, may vary the concession so as to enable it, as modified, to be certified.

Concessions are generally obtained in consideration of the payment of rent, sometimes in consideration of the payment of a lump sum and rent. The consideration must be adequate; a stamp duty of £25 [1] and a royalty of 5 per cent. on assessed profits are also payable to the Crown.

The concession area may not, in the case of a mining concession (as distinct from a rubber, etc., concession), exceed five square miles, but the same concessionaire may hold in all concessions covering an area not exceeding twenty square miles.

Instead of a long-term concession, the concessionaire may obtain a short-term option. Such an option is a concession for the purposes of the Stamp Ordinance and generally. Mineral, as distinct from rubber, etc., options may not be obtained either in Ashanti or Sierra Leone.

Dealing with Minerals.—Ordinances exist such as the Gold-mining Products Protection Ordinance, the Mineral Oil Pre-emption Ordinance, and the Non-ferrous Metal Industry Ordinance, imposing various restrictions on dealing with certain minerals, ores, and mineral oils. By the various Concessions Ordinances, provisions exist designed to prevent the mining for mineral oils by persons other than British subjects, and by the Mineral Oil Pre-emption Ordinance, 1907, the Crown is given a right of pre-emption over all mineral oil mined.

Registration.—The certificate of validity is registered and the registry may be searched.

The Northern Territories.—The mining law of the Northern Territories is based on the Mineral Rights Ordinance, 1904, and the Northern Territories Rivers Ordinance, 1903. The concession system does not apply, and prospecting and mining operations must be carried out in virtue of a series of licences (some of which are termed options) granted by the Crown, which licences confer upon the licencees, subject to various important conditions and reservations in the interests of the natives concerned, the right to prospect or mine.

The following licences may be granted: (1) Prospecting licences, (2) prospecting options, (3) mining options, (4) mining licences, (5) dredging licences. As regards (2), (3), and (4), no one may hold one unless at the time of application he is the holder of the preceding one. The fees payable are small, varying from 1s. per square mile in the case of a prospecting licence, to £50 per annum per square mile for a mining licence where native interests are involved.

The prospecting licence is a non-exclusive general licence; it is effective for six months, but may be renewed for a further six months. It cannot be assigned. The prospecting option is exclusive and may be assigned; it lasts for three years. The mining option continues for three years, and may be extended up to five years. The area covered may be five square miles per mining option, but more than one mining option may

[1] Certain minor stamp duties may also be, and generally are, payable.

be held by the same person. It may be assigned by consent. It does not confer upon the holder the right to mine, but only the right to do all the usual preparatory work, such as setting up mining machinery in order to mine. The holder has the right to call for a mining licence, which licence, on proof that the applicant is in a position to commence mining operations, may be granted for any period not exceeding ninety years.

Dredging licences are necessary before dredging operations can be commenced on the rivers mentioned in the schedule to the Northern Territories Rivers Ordinance, 1903. The fee payable, as in the case of the Gold Coast, is £5, and the rights conferred are substantially the same.

THE NEW CONSTITUTION OF PERU (JANUARY 18, 1920).

[*Contributed by* WYNDHAM A. BEWES, ESQ.]

THE Constitutions adopted by the States which represent the former colonial dominions of Spain in the New World were drafted at a time when the only important precedent of modern times was afforded by the then recent Constitution of the United States of North America, and one of the natural results was that more considerable powers were conferred on the respective Presidents of the new Republics than were possessed by the monarchs of the crowned Commonwealth of the United Kingdom. The extent of these powers in the different countries has been the subject of contention, and their exercise has sometimes provoked unrest, so it is not a matter of surprise, in these increasingly democratic times, to find that in many of the Republics new Constitutions have lately been promulgated, and that an outstanding feature is the limitation of the exercise of the prerogative of the President. Undoubtedly the lead in democratising in other directions the Constitutions of the countries of the New World was taken by Mexico when, under the influence of the late President Venustiano Carranza, the reformed Constitution of 1917 was adopted. It is not our purpose here to trace the numerous amendments which were then made. They were, in fact, too numerous for detailed mention: but it is desirable to emphasise the fact that it has been under this Mexican impulse that other countries of Latin America have been reconsidering the forms of Government under which they live, and have adopted for themselves many of the changes which to Mexico seemed first advisable. To remove the election of President from the mediation of political legislative bodies and institute direct election by the people, to suppress the institution of Vice-Presidents as tending to lead to ambitious frictions, to include

provisions protective of labour, and to eliminate ecclesiastical interference in political affairs, constituted notable elements, and occasion the flattering imitation rendered by more than one State subsequently.

Collegiate Government.—While paying this tribute to Mexico, it is well at the same time to refer to one important change, which has evidently been influenced by the precedent of the new Constitution of Uruguay[1]—namely, the institution of something like a Cabinet, or, as it has been called by some Spanish writers, Collegiate Government. Art. 134 of the new Peruvian Constitution provides for a Council of State, composed of seven members appointed by the Council of Ministers with the approbation of the Senate. "The law shall determine the cases in which the Government must hear their opinion and those in which it cannot proceed contrary thereto." This future law is evidently intended to limit the Presidential powers, though its terms are wide enough to include the legislative and judicial branches as well as the Executive. There is no similar provision in the Mexican Constitution.

Now, in considering a few details of the innovations in the Peruvian Constitution, it is necessary to warn the reader that many of the matters now for the first time included in the more stable instrument have long been regulated in the same sense by the Organic Laws of the Nation. Thus the principle of the freedom of the Press, enacted by the Organic Law of 1823, repealed in 1855, and re-enacted in 1861, is now incorporated in the Constitution, and so is the right to apply for a writ of Habeas Corpus which was given by the Organic Law of 1897. Settlement of property in succession is contrary to the Civil Law: it now becomes part of the Constitution, and so on.

National Guarantees.—Among "National Guarantees" are included the progressive income-tax (Art. 8), and the prohibition of pluralities in the holding of public office (Art. 12). Among the social guarantees is an important one which may appear rather a qualified safeguard for the property of foreigners, but nevertheless a wholly proper provision, forbidding any exceptional favourable position in their favour, and prohibiting resort to claims through diplomatic channels. Within fifty kilometres of the frontiers, no foreigners directly or indirectly, either in their own right or in association, can acquire or possess any right to lands, waters, or mines (Art. 39). No doubt the land frontiers only are intended. All mineral property is declared to belong to the State (Art. 42). No acquisition by prescription can occur as against not only the State, but public institutions and the communities of indigenous natives (Art. 41).

Nationalisation and Labour.—A sign of the times is to be observed in Art. 44, where it is provided that the State is empowered to take under its control or to nationalise land, sea, and aerial transport and

[1] See *Journ. Comp. Leg.*, 3rd ser., vol. ii, p. 60.

other public services, on paying proper compensation. The protection and organisation of industrial workers occupy four short articles, details being entirely left to legislation. It will be seen that this forms a great departure from the Mexican Constitution, which in Title VI. contains a veritable Charter of Liberty and Protection of Labour, with adequate safeguards for employers' interests. We recommend a study of this Title to our Labour organisations.

Monopolies and other Social Reforms.—By Art. 50 industrial and commercial monopolies and "corners" are forbidden, except those established by the State in the national interest; Art. 51 authorises the fixation of maximum interest, and by Art. 52 gaming is prohibited with the exception of bets at public spectacles. Rather out of its order comes a provision (Art. 57) which also bears signs of recent social difficulties. It authorises laws in circumstances of extraordinary social necessity, empowering the Executive to make provision for cheapening articles of consumption and for appropriation subject to compensation. Our Aborigines Protection Society will hail Art. 58, which says: "The State shall protect the indigenous race, and enact special laws for its development and culture in harmony with its necessities. The Nation recognises the legal existence of communities of indigenous natives," etc.

The Legislatures.—Military service is obligatory on all Peruvians, and no citizen can exercise the right of suffrage or be elected President, Senator, or Deputy who is not inscribed on the military register (Arts. 61, 66). The office of President and the existence of the Legislature and Executive last for five instead of four years, and these entities are renewed simultaneously by direct popular vote of the male nationals who have attained 21 years of age or have married under that age (Title 7). No legislator can enjoy any public employment in the National or Local Administration (Art. 77). The functions of a Senator or Deputy are suspended during Ministerial office (Art. 131), and Ministers have therefore no right to take part in debates or to vote, though they may attend the legislative sessions, retiring before votes are taken (Art. 130). Congress must authorise the tariff of import duties, and empower the Executive to make such contracts as engage the property or general income of the State (Art. 83). On the other hand, the Government alone can propose personal State gratuities and the increase in the salaries of public employees (Art. 85).

The Senate has now the right of disapproving diplomatic appointments and the members of the new Council of State (Art. 97). The Chambers are given the right of appointing Parliamentary Committees of investigation and information, and of asking questions of Ministers (Art. 99).

Following the Mexican Constitution, provision is made for reconsideration of a Bill rejected by the Second House. It is returned to

the House of origin, and if again carried by two-thirds of the members, requires a similar two-thirds of the Second House for its rejection (Art. 103). The President has ten days wherein to make criticisms, which require the re-submission of the Bill to the two Chambers, which can then pass it finally by the above-named majorities (Art. 105). If the Executive fails to promulgate a new law, this may be done by the President of Congress (Art. 106). No secret sessions may be held for "economic" matters (Art. 108).

No Minister and no soldier on active service can be elected President unless he has laid down his office 120 days before the election (Art. 120). Again, following the Mexican Constitution, only nationals may hold ecclesiastical office [Art. 121 (18)].

Three regional Legislatures, *i.e.* for the north, centre, and south of the Republic, are to be established (Art. 140).

Judiciary.—By Art. 149, members of the Judiciary cannot be appointed to discharge any political office, except that Judges of the Supreme Court may be appointed Ministers of State. (The first part of this article may be recommended for British observance.) The undue prolongation of criminal proceedings is added to the causes which produce rights of action against peccant judges.

On the whole this is an advanced Constitution, differing principally in form from the Mexican, and embodying details which in the Peruvian are left to subsequent legislation. Where this happens, the benefit of declaring bare principles in the Constitution is less evident. A law can be altered or repealed in a single Legislature, while it requires two successive Congresses to modify the Constitution. We refer in particular to the indefinite powers to be exercised by the new Council of State and to such provisions as are contained in Arts. 47–9, which merely provide that future laws shall be passed for the protection, etc., of workmen in reference to life insurance, health, and safety, maximum conditions, minimum wages, compensation for accident, and compulsory arbitration.

THE ALIEN ENEMY IN ENGLISH LAW.

[*Contributed by* R. F. ROXBURGH, ESQ.]

THE time seems to be opportune to review the position of an alien enemy in English law at the end of the war with Germany. Since the Treaty of Peace has been ratified, and the private property clauses have received statutory force, the liquidation of businesses or companies set on foot under the Trading with the Enemy Acts can now be finally completed, and all German property in the hands of the Custodian can be distributed in accordance with the Treaty. In this

process difficult questions are arising, which involve a study of war legislation and judgments. Moreover, if the British Empire should again be at war, our recent experiences would be the basis of the earlier decisions and statutes in that time of emergency; and the authorities would gladly turn to a summary statement of the developments during this great war, as they appeared to a thoughtful writer who watched them come to pass. Mr. McNair has therefore done well to attempt an estimate of the "permanent impression made upon the law during the past five years of war."[1]

From older wars—in particular from the Napoleonic and Crimean wars—our Courts had inherited three doctrines of outstanding importance, according to which: (1) An alien enemy had no *persona standi* in an English Court during war; (2) intercourse across the "line of war" was illegal; (3) the confiscation of private enemy property, at any rate under ordinary circumstances, was regarded as contrary to modern practice. It remained for our judges to apply these traditional doctrines to new questions which arose under the changed conditions of the recent war, and for Parliament to extend their scope and add to their number.

An alien enemy has no persona standi.—"The modern law," Mr. McNair tells us, after carrying his interesting researches back to Magna Carta, "may fairly be said to begin with the case of *Wells* v. *Williams* (1697)."[2] But the rule was laid down beyond possibility of challenge by Sir W. Scott (Lord Stowell) in the leading case of *The Hoop* (1799)[3]:

> In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*; but otherwise he is totally *exlex*!

This rule, "as certain as language could make it, as curt as the commandments,"[4] was attacked in 1907 at the Hague Conference by a then unsuspected foe. By Art. 23 (*h*) of the Hague Regulations concerning the Laws and Customs of War on Land (an addition to Art. 23

[1] *Essays and Lectures upon some Legal Effects of War.* Cambridge University Press, 1920. 10*s.* 6*d.*

[2] Ld. Raym. 282; 1 Salk. 46; 1 Lutw. 34; McNair, *op. cit.*, p. 31.

[3] C. Rob. 196 at p. 201. McNair, *op. cit.*, p. 32.

[4] Lord Sumner in *Rodriguez* v. *Speyer Bros.*, [1919] A. C. 59 at p. 117.

made on the proposal of Germany), it is forbidden " to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party." [1] These words were at once interpreted by most Continental publicists and by some English and American writers as imposing upon England, and upon other States which denied to an alien enemy the right to sue in their courts during war, an obligation to alter their municipal law. The official German White Book hastened, as might be expected, to put this construction on the amended article:

> Article 23 has also received on German proposal two weighty additions. By the first the fundamental principle of the inviolability of private property in the domain of legal claims is recognised. According to the legislation of individual States, war has the result of extinguishing or temporarily suspending, or at least of suppressing, the liability of the State or its nationals to be sued by nationals of the enemy. These prescriptions have now been declared inadmissible by Article 23(*h*).

The late Professor Oppenheim brought the matter before the Foreign Office, which in a published reply repudiated the meaning placed upon the article abroad. The authorities pointed to its position among regulations for the operations of armies in the field, to the unsuitability of the language used for the purpose to which commentators sought to apply it, and to the circumstances under which Germany secured its insertion. They concluded with a declaration that His Majesty's Government had not become parties to any modification of the law laid down in *The Hoop* by agreeing to a convention which related only to instructions to be given to commanders of armed forces.[2] By thus publicly taking exception, *ante litem motam*, to a Continental interpretation of an ambiguous clause in a Treaty, Great Britain avoided any obligation under international law to be bound by that interpretation,[3] and the way was clear for the Court of Appeal in *Porter* v. *Freudenburg* [4] to reaffirm the historic English rule.

But while it was thus settled that in general an alien enemy fell under a personal disability which prevented him from bringing an action in an English court, the exact nature of those circumstances which *pro hac vice* discharged him from that character was still uncertain. Was the effect of registration under the Aliens Restriction Act and Order, 1914, to give an implied licence, thereby putting the alien enemy within the King's Peace within the meaning of Lord Stowell's

[1] Misc., No. 1 (1908), Cd. 3857, p. 86.
[2] Oppenheim, *The League of Nations*, pp. 45–55.
[3] Oppenheim, *International Law*, vol. i, s. 554.
[4] [1915] 1 K.B. 857.

definition? Sargant J. so held in *Princess Thurn and Taxis* v. *Moffitt*,[1] and his judgment was soon cited with approval in the Court of Appeal.[2] This being so, did subsequent internment as a civilian prisoner of war revoke the licence implied from registration? It was held in *Schaffenius* v. *Goldberg*[3] that it did not. Again, could an alien who had become an enemy while his action was proceeding continue it in spite of the supervening disability? *Shepeler* v. *Durant*,[4] a Crimean War case, suggested that he might; but *Hellfeld* v. *Rechnitzer*[5] negatived this view. Could an alien enemy sue *en autre droit*? Could he be joined as a nominal plaintiff for the purposes of pleading?[6] Could he appear in the Prize Court to claim the benefit of an international convention? The President held that he might so appear whenever he believed himself entitled to "any protection, privilege, or relief under any of the Hague Conventions of 1907."[7] Was it within the competence of a defendant to waive the plea of alien enemy, having regard to *Janson's case*?[8] Could a company incorporated in England be an alien enemy? The Continental Tyre and Rubber Co. (Great Britain), Ltd., was a company of which all the shares except one were held by Germans in Germany, and all the directors were Germans resident there. The one non-enemy share was held by the secretary, a naturalised British subject. It was held by the Court of Appeal that the company was nevertheless an English company, and that (in the circumstances of the case) the secretary had authority to institute an action.[9] This decision was reversed by the House of Lords[10] on the second point, but the majority (Lords Halsbury, Parker, Mersey, Kinnear, and Sumner, against Lords Atkinson, Shaw, and Parmoor) expressed the view that it was necessary to look behind the incorporation to the constitution of the company. Lord Parker stated in a judgment concurred in by Lord Mersey, Lord Kinnear, and Lord Sumner, that a company assumes enemy character

if its agents or the persons in *de facto* control of its affairs are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. . . . The char-

[1] [1915] 1 Ch. 58.
[2] [1915] 1 K.B. 857, at p. 874. McNair, *op. cit.*, p. 33.
[3] [1916] 1 K.B. 284. Judgment of Younger J. confirmed by the Court of Appeal. See McNair, *op. cit.*, p. 46.
[4] [1854] 14 C.B. 582. See McNair, *op. cit.*, p. 34.
[5] *The Times*, December 11, 1914.
[6] *Rodriguez* v. *Speyer Bros.*, [1919] A.C. 59.
[7] *The Möwe*, [1915] P. 1, at p. 15.
[8] [1902] A C. 484. See McNair, *op. cit.*, p. 43, and Bailhache J. in *Robinson & Co.* v. *Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155, at p. 159.
[9] [1915] 1 K.B. 893.
[10] [1916] 2 A.C. 307.

acter of individual shareholders cannot of itself affect the character of the company.[1]

If an alien enemy could not sue, could he be sued? Yes, he could,[2] and might "take all such steps as may be deemed necessary for the proper presentment of his defence."[3] These and many other questions connected with the procedural capacity of alien enemies (such as appeal, counterclaim, and set-off), have been settled in our Courts during the war without help from the Legislature,[4] and are discussed by Mr. McNair in the second and third chapters of his book; but we must pass to the second fundamental doctrine inherited from previous wars.

Intercourse across the "line of war" is illegal.—"Ever since the great case of *The Hoop*,"[5] the words are those of Lord Reading delivering the judgment of the Court of Appeal in *Porter* v. *Freudenberg*,[6] "the law has been firmly established . . . that one of the consequences of war was the absolute interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country except by permission of the Sovereign." This principle, already settled during the Napoleonic Wars, was reiterated in *Esposito* v. *Bowden*,[7] a case which arose out of a charter party in the Crimean War, "the presumed object of war being as much to cripple the enemy's commerce as to capture his property." Lord Reading found that the doctrine was based in earlier days upon the conception "that all subjects owing allegiance to the Crown were at war with the subjects of the State at war with the Crown,"[8] a conception which, at any rate in the field of international law, prevailed without challenge until in 1801 Portalis introduced Rousseau's *dictum* ("La guerre n'est point une relation d'homme à homme") in the French Prize Court.[9] Dr. Baty, however, has found the origin of the non-intercourse rule elsewhere: "Investigation would seem to prove that the ground is one of expediency based on the danger of unrestricted communication with the enemy"[10];

[1] At p. 345.

[2] *Robinson & Co.* v. *Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155.

[3] Lord Reading in the Court of Appeal. *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, at p. 883.

[4] Except that by the Legal Proceedings against Enemies Act, 1915 (5 Geo. V. c. 36), Parliament provided special means for serving an enemy where a British subject sought a declaration as to the effect of the war on a pre-war contract evidenced in writing.

[5] 1 C. Rob. 196.

[6] [1915] 1 K.B. 857, at p. 867.

[7] In the Court of Exchequer Chamber, (1857) 7 E. & B. 763, at p. 779.

[8] [1915] 1 K.B. 857, at p. 868.

[9] See Hall, *International Law*, 6th ed., p. 65.

[10] In the *Law Quarterly Review*, xxxi. (1915), p. 30.

and Mr. McNair attributes it largely to the procedural incapacity of an alien enemy.[1] However this may be, in modern times it has been placed upon grounds of public policy,—upon the military advantage of destroying enemy trade,[2] upon the necessity of contributing nothing to his resources,[3] and upon the importance of stopping up a possible channel of information.[4]

But, whatever its origin or justification, the rule itself was clear: "the force of a declaration of war is equal to that of an act of Parliament prohibiting intercourse except by the Queen's licence"[5]; and only its extent was uncertain. Did it embrace all intercourse or only commercial intercourse? The Court of Appeal held, in 1915, that it at any rate extended to all intercourse which could tend to the detriment of this country or to advantage to the enemy,[6] and Lord Dunedin approved this judgment in the House of Lords.[7] Or, again, did the rule operate to dissolve a contract which contained a clause suspending performance during war? The House of Lords in the *Rio Tinto* case,[8] looking to the grounds of public policy upon which the prohibition is now based, held that it did dissolve such a contract, Lord Sumner adding, as a further ground, that the certainty of large supplies being available at the end of the war would materially assist the enemy in the prosecution of the war.[9] Mr. McNair points out that the same argument might be used to justify the wholesale confiscation of enemy private property on land, and the total abolition of an alien enemy's rights of action, and regards it as "specious and dangerous."[10] But in a branch of the law in which there is a perpetual conflict between private rights and the necessities of national defence, the question in each group of cases is not what any one principle, applied to the exclusion of others, might justify, but rather where the balance is to be struck between divergent principles.[11]

While the Courts were left to apply the doctrine of non-intercourse to contracts concluded before the war between British subjects and

[1] *Op. cit.*, p. 64.

[2] Dr. Baty considers (*loc. cit.*) that this justification was first put forward about the middle of the nineteenth century.

[3] By Lord Reading in *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, at p. 868 and elsewhere.

[4] For example, by Lord Dunedin in the *Rio Tinto* case, [1918] A.C. 260, at p. 274, and by Lord Atkinson at p. 276.

[5] *Esposito* v. *Bowden*, 7 E. & B. 763, at p. 781.

[6] *Robson* v. *Premier Oil and Pipe Line Co.*, [1915] 2 Ch. 124, at p. 136.

[7] In the *Rio Tinto* case, [1918] A.C. 260, at p. 268.

[8] [1918] A.C. 260.

[9] At p. 290.

[10] *Op. cit.*, p. 67.

[11] The different treatment accorded to enemy private property on land and on sea in itself shows this.

enemies, completing their task in the stages recorded by Mr. McNair in this useful volume of lectures and essays, Parliament as early as September 18, 1914, had, by the Trading with the Enemy Act, 1914,[1] declared and supplemented the common law rules prohibiting intercourse across the line of war in its more obvious aspects. This Act gave a statutory definition of the offence of trading with the enemy, and provided for its punishment.[2] It extended to any transaction since the outbreak of war and during its continuance which was prohibited at common law, by statute or by any Trading with the Enemy Proclamation. Of these the most important was the Proclamation of September 9, 1914.[3] The definition of "enemy" there given shows, as indeed the later history of the non-intercourse rule would lead us to expect, that the Government were at that time anxious to prevent trading with certain persons, not because of their enemy nationality, but on account of their residence in an enemy country. The transactions expressly prohibited by it were all such as would improve the financial or commercial position of a person trading or residing on the other side of the line of war[4] (and consequently of the country in which he was trading or residing), such as paying money to him, securing a debt due to him, dealing with any negotiable instrument, stocks, shares, or other securities in which he was interested, handling goods destined for him or coming from him, or entering into any contract for his benefit.

The two remaining operative sections of the first Trading with the Enemy Act were directed to the case of suspect businesses. It was obvious that certain classes of businesses, either because they were owned or managed by alien enemies, or had been associated with them in trade before the war, or otherwise, would have special inducements to engage in forbidden trade; other businesses, having already been detected in unusual dealings, or on many other grounds, might reasonably be suspected of having offended, or intending to offend. Yet it was vital that the trade of the British Empire should not be still more disarranged at that critical period which comes early in a war, either by the abrupt suspension of such concerns through legislative action, or by their gradual decay following a general boycott or the absence of their directing minds. To meet this situation, the Act provided (s. 2) for the inspection of their books and the investigation of their affairs, and, in certain cases (s. 3), for the appointment of a controller by the High Court to supervise the carrying on of the business. In this way

[1] 4 & 5 Geo. V. c. 87.

[2] S. 1. It was to be punishable as a misdemeanour. As to the nature of the offence at common law, see McNair, *op. cit.*, p. 102.

[3] Printed by Mr. McNair as an appendix, p. 131.

[4] This convenient phrase, adopted by Mr. McNair, seems to have been borrowed from the United States. See McNair, *op. cit.*, p. 59.

Parliament hoped to prevent offences in likely quarters without unnecessarily upsetting trade.

This Act was very soon supplemented by the Trading with the Enemy Amendment Act, 1914,[1] which received the royal assent on November 27, 1914. The amending Act had a double purpose. The object of the later sections (ss. 10–13) was to extend the scope of the first Act by enlarging the offence of trading with the enemy, adding a further ground for the appointment of a controller of businesses, and making provision for frequent inspection of the books and constant supervision of the business of concerns liable to inspection under the first Act, in cases where no controller was appointed. But the Amendment Act of 1914 was in the main directed to a different problem. Sums of money, which but for the war would have been transmitted to persons in enemy countries, were accumulating, and there was other property which was removed from the control of its owner owing to the war. The danger of prohibited intercourse across the line would certainly be reduced, and the disposition of such property at the end of the war would undoubtedly be assisted, if an officer of the Government were appointed to take it in charge. That these considerations were then uppermost may be inferred from the language of the preamble:

> Whereas it is expedient to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war . . . and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to (such persons). . . .

In furtherance of this purpose, the Public Trustee was appointed Custodian of Enemy Property for England and Wales[2]; and it was his duty to receive and place on deposit or invest dividends and other sums[3] which became due and payable to persons separated by the line of war, or for their benefit, and subject to the payment of debts in certain cases,[4] to hold these funds, unless otherwise directed, until the termination of the war. This procedure was in accord with the third doctrine handed down from earlier wars.

The confiscation of private enemy property, at any rate under ordinary circumstances, is contrary to modern practice.—In former times, on the outbreak of war, States were in the habit of confiscating

[1] 5 Geo. V. c. 12.

[2] S. 1.

[3] As to these sums, see s. 2(5) of this Act, and s. 1 of the Trading with the Enemy Amendment Act, 1915 (5 & 6 Geo. V. c. 79).

[4] See s. 5.

all enemy property, public and private[1]; and there can be little doubt that, by the law of England, the Crown then enjoyed a right to confiscate all such property within the realm.[2] But the last case of general confiscation recorded by Oppenheim took place in 1793, at the outbreak of war between France and Great Britain, and it was the prevailing opinion, as was stated by Swinfen Eady L.J. that in England, "as to property on land, this prerogative has long fallen into disuse."[3] Lord Reading voiced the generally accepted legal view in saying "there is manifestly no question of exercising this right."[4] In the House of Lords, Lord Finlay went further, and said, "It is not the law of this country that the property of enemy subjects is confiscated."[5] The whole question has now been probed to its depths before the Court of Appeal, in the case of certain property of the former sovereign of Bulgaria. A Commission appointed under the Great Seal found that the rights of the ex-Czar were forfeited to the Crown at the outbreak of war with his State. The ex-Czar was allowed to appeal against this finding. The Court held (*The Times*, July 31, 1920) that the right to seize enemy private property on land was in existence at the time of the outbreak of war with Bulgaria, but that the provisions of the Trading with the Enemy Acts were inconsistent with an intention of preserving a power to insist on an absolute forfeiture at law.

The arrangements made for vesting enemy property in the Custodian suggest confirmation of the view that the general confiscation of private enemy property on land at the beginning of a war is no longer in accordance with English law or the law of nations. For by the Amendment Act of 1914, not only were dividends and other sums payable to a person separated by the line of war to be paid to the Custodian, but his real and personal property of all kinds might, by an order of the Court, be vested in the Custodian, and returns of such property were to be made.[6] The Act provided for the payment of debts in certain cases,[7] but Younger J., in administering it, pointed out over and over again that it was an Act not primarily for the benefit of creditors, but designed to protect the property until the end of the war, when arrangements would be made for its disposal.[8] And so s. 5 of the Act directed the Custodian to hold property vested in him under this Act,[9] as well as money paid to

[1] Oppenheim, *International Law*, vol. ii., p. 139.

[2] See Lord Reading in *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, at p. 869.

[3] In *Hugh Stevenson & Sons* v. *A.-G. für Cartonnagen-Industrie*, [1917] 1 K.B. 842, at p. 848.

[4] In *Porter* v. *Freudenberg*, [1915], 1 K.B. 857, at p. 870.

[5] [1918] A.C. at p. 244.

[6] Ss. 3, 4.

[7] S. 5.

[8] See, for example, *in re Ling and Duhr*, [1918] 2 Ch. 384.

[9] Subject to any direction to the contrary by the Board of Trade or the Court.

him, until the termination of the war, and thereafter to deal with it as provided by Order in Council.

The Transition to a New Principle.—The Trading with the Enemy Amendment Act, 1915,[1] oiled the machinery of the earlier Acts, but introduced no new principle. The Trading with the Enemy (Extension of Powers) Act, 1915,[2] was, however, of another kind. "It is broadly true to say that the main purpose of the earlier Acts . . . " writes Mr. McNair, "is to prevent intercourse with the enemy across the line of war; while the main purpose of the later Acts . . . is to stamp out enemy commercial influence and operations in this country and elsewhere."[3] The Extension of Powers Act marks the transition. Designed to strike at trade between the enemy and foreign countries, so as to accentuate the economic blockade, it authorised His Majesty by Proclamation to prohibit all persons in the United Kingdom from trading with any persons in foreign countries whose enemy nationality or enemy association made such prohibition expedient. Lists of such persons, familiarly known as "Black Lists," were issued, and aroused bitter criticism in States then neutral. The United States Government found the Act "pregnant with possibilities of undue interference with American trade," and suggested that the right of persons of whatever nationality domiciled in the United States to trade with belligerent countries had been overlooked.[4] The measure certainly marked a departure from the old rule of English law and the principle of the previous Acts that domicile supplied the test of enemy character; but it was intended, as the British Government explained, to give greater effect, in the face of modern conditions, to one of the main purposes of the non-intercourse rule, "to deprive the enemy of all assistance, direct or indirect, from national resources."[5] In international law the Act is unimpeachable, because every State is competent to restrict as it thinks fit the commercial activities of its subjects.[6]

A New Principle: German Influence in the United Kingdom.—The Trading with the Enemy Amendment Act, 1916,[7] which was passed on January 27, 1916, introduced a wholly new principle into English law, because it was aimed, not so much against the resources of the enemy for prosecuting the war, as against that economic penetration of foreign countries from which Germany derived much of her ability and self-confidence to begin the war.[8] This Act opened the attack on German commercial and financial control which was pressed home in the Treaty of Peace, and though a war measure, looked beyond the war.

In this Act "enemy," as might be expected, means no longer a per-

[1] 5 & 6 Geo. V. c. 79.
[2] 5 & 6 Geo. V. c. 98.
[3] At p. 25.
[4] Misc. No. 11 (1916), Cd. 8225.
[5] Misc. No. 11 (1916), Cd. 8225.
[6] *Ibid.*
[7] 5 & 6 Geo. V. c. 105.
[8] See McNair, *op. cit.*, p. 129.

son separated by the line of war, but a person possessing the nationality of a State at war with His Majesty, or a body corporate constituted according to its laws.[1] The Board of Trade were by it directed,[2] unless it appeared to them to be inexpedient for any special reason to do so, to order any business in the United Kingdom which was carried on wholly or mainly for the benefit of enemy subjects, or under their control,[3] to be wound up, or only to be carried on under restrictions. The scheme of this part of the Act was that the Board, under the general power of inspection conferred upon them for this purpose,[4] should search out such *businesses*, and that they (as distinct from the general property and assets of the owner) should be curtailed or entirely wound up by order of the Board under the supervision of a controller; that such debts as were properly chargeable against the business, and such debts only, should be paid (preference being given to non-enemy creditors), and that the balance of the proceeds of liquidation should be distributed among the persons interested therein, the share[5] of enemies being paid over to the Custodian.[6] Moreover, lest enemy commercial influence in the United Kingdom should still survive through the continuance of favourable contracts, power was conferred upon the Board to cancel contracts with certain classes of persons, whether made before or since the outbreak of war, if they appeared to be "injurious to the public interest"[7]; and lest it should find new spheres of activity in gaining control of companies registered in the United Kingdom, elaborate provision was made to prevent enemy subjects from themselves being or appointing others to be directors of, or acquiring shares in, such companies, without leave of the Board of Trade.[8]

This Act also provided[9] that returns should be made by enemy subjects within the United Kingdom of any shares or other securities, and of any other property of the value of £50 in which they were interested, and the *Board of Trade* was empowered—contrast this provision with s. 4 of the Amendment Act of 1914—to vest any property belonging to, or held or managed for or on behalf of, *an enemy or an enemy subject*, in the Custodian, to be dealt with by him in like manner as funds paid to him or property vested in him under the Amendment Act of 1914.

While the Board of Trade had no power under this Act to wind up a company, as distinct from a business, the Act did authorise the Board[10]

[1] S. 15. [2] S. 1.

[3] One test of such a business, but not the only test, was to be the enemy nationality or association of the person, firm, or company, or of a member of the firm or company, carrying on the business. S. 1 (1).

[4] By s. 3.

[5] And also sums payable to enemies as creditors of the business. S. 1 (3).

[6] S. 1 (3). [7] S. 2. [8] S. 10. [9] Ss. 4, 5. [10] S. 1 (7).

to present a petition to the Court for the winding up of a company in respect of whose business an order had been made under the Act, and the making of such an order was to be itself a ground upon which the company might be wound up by the Court. This provision paved the way for the further step taken by the Trading with the Enemy Amendment Act, 1918,[1] which not only made special arrangements for such a winding up by the Court, but also empowered the Board itself to make a winding-up order, appoint a liquidator, and wind up the company as therein provided.[2]

S. 2 of the Amendment Act of 1918 was a new move in the campaign against enemy commercial influence in the United Kingdom, and was directed against one of its most effective instruments, banking. This section is avowedly not war legislation, but post-war legislation. It is to be in force "during the period of five years immediately after the termination of the present war, and thereafter until Parliament otherwise determine," and it prohibits a firm or individual whose business is carried on wholly or mainly for the benefit of, or under the control of, enemy subjects, within the meaning of the Amendment Act of 1916, or an "enemy-controlled corporation," from carrying on banking business in the United Kingdom. The Act of 1918 defines an enemy-controlled corporation as one in which subjects of a State at war with Great Britain on August 8, 1918, constitute the majority of the directing body or hold the majority of the shares or voting power themselves or by nominees, or control the corporation "by any means whatever," or one of which the executive is an enemy-controlled corporation, or of which the majority of the executive are appointed by an enemy-controlled corporation.[3]

The attack launched by these later Trading with the Enemy Acts upon the activities of enemy subjects is carried on by the Aliens Restriction (Amendment) Act, 1919.[4] Some of its provisions, such as the special penalties for promoting sedition, disaffection, or industrial unrest, disqualification for pilotage certificates, exclusion from the Civil Service, and from the more responsible posts in the mercantile marine, and restrictions upon change of name and service on juries, apply to all aliens alike; but others, such as that providing for the deportation of certain former enemy aliens, or that prohibiting former enemy aliens from landing in the United Kingdom for three years without a permit, or that disabling them during a like period from acquiring any land or interest in land,[5] or any interest in a "key industry," or any share in a company registered in the United Kingdom and carrying on a "key industry," or any share in a company owning a British ship, or that preventing them from being members of the crew

[1] 8 & 9 Geo. V. c. 31. [2] S. 1.
[3] S. 13. [4] 9 & 10 Geo. V. c. 92.
[5] Other than a tenancy for not more than three years at a rack rent.

of a British ship registered in the United Kingdom,[1] are confined to subjects of those States which were numbered among the Central Powers in the war.[2]

Having thus legislated for enemy influence at home, the British Government collaborated with the Allied and Associated Powers in dealing a blow by the Treaties of peace against the financial and economic strength of the Central Powers throughout the world. That strength was in the main the strength of Germany, and the German Treaty marks its present overthrow.

German Influence Abroad.—The financial and economic clauses in parts ix. and x. of the Treaty[3] give constant proof of the determination of the victorious Powers to overthrow the dominion of Germany over the trade and finances of foreign countries. Among the means for acquiring or maintaining an ascendancy of this kind, none are more effective than the operations of powerful syndicates of bankers or contractors. They advance capital to the poorer States, assist them in modernising their backward industries, and construct railways and public works, taking as their security the control and administration of these vital industries and services, or even of the fiscal policy of the State itself. Often, in those debated spheres where the commercial ambitions of many nations come into conflict, representative groups of financiers drawn from each of them combine to exercise this control, each content to enjoy a part where none would long remain in undisturbed possession of the whole. By such means and from such combinations, Germany built up her commercial tyranny before the war. But by the Treaty of Peace, many countries in which she used to work have been closed to her; and she is to surrender, when called upon, the remnants of her former power. For by Art. 258 Germany renounces her right to representation upon international, financial, or economic organisations, exercising powers of control or administration in any of the Allied or Associated States, or in the territory of her former Allies, or in the old Russian Empire; and by Art. 260 the German Government, upon the demand of the Reparation Commission, is to acquire and hand over the rights and interests of German subjects "in any public utility undertaking or in any concession" operating in any of those countries, or in China, or in territory ceded by the Central Powers, or subject to a mandate.

But with these provisions the campaign against German commercial influence has passed out of the range of English law into the field of

[1] Ss. 9–12.

[2] With the additions and exceptions mentioned in s. 15.

[3] A useful edition of the text, with a preface by Lord Robert Cecil, and an introduction by H. W. V. Temperley, has been published at five shillings by H. Frowde and Hodder & Stoughton for the British Institute of International Affairs. It is a handy volume, contrasting favourably with the official edition at one guinea.

foreign policy. It only remains, therefore, to glance at the arrangements made in the Treaty for the final adjustment of German private property rights and interests in the United Kingdom at the conclusion of the war.

German Private Property Rights and Interests under the Treaty of Peace.—The Treaty expressly confirms all vesting orders, orders for the winding up of businesses or companies, or any other orders, whether made by the Courts or by any Department of Government (such as the Board of Trade) in pursuance of war legislation, such as the Trading with the Enemy Acts, and, in general, all measures taken by the authorities with regard to German property during the war. It indemnifies the British Government, and all persons acting under legal or administrative authority, against all claims in respect of such property growing out of acts done during, or in preparation for, the war.[1] German private property which still remained unliquidated may now be realised,[2] and it, or the proceeds of its sale, together with the funds and property which have accumulated in the hands of the Custodian in the name of German subjects, form a pool out of which certain claims of British subjects can be met.[3] Any surplus that may be left will be treated as payment by Germany *pro tanto* of her reparation bill.[4] This arrangement cannot properly be regarded as sanctioning any general practice of confiscating enemy private property on land, because Germany has accepted an obligation under the Treaty to compensate her subjects for their loss,[5] the amount due to the individual owner as compensation from the British Government being retained by it to meet the debt due from Germany. This is the general principle: but it is subject to exceptions and reservations. For instance, certain pecuniary obligations are to be dealt with according to Art. 296, and rights of literary, artistic, or industrial property which are not disposed of in the liquidation of a business or company[6] are to be adjusted according to Arts. 306 to 311.

For contracts the Treaty adopts abrogation as the general rule. "Any contract concluded between enemies shall be regarded as having been dissolved as from the time when any two of the parties became enemies, except in respect of any debt or other pecuniary obligation arising out of any act done, or money paid thereunder."[7] But certain classes of contracts are to be treated differently. In favour of alien enemies, the Treaty suspends all periods of prescription or limitation of right of action for the duration of the war, and extends the time within which necessary formalities may be complied with.

[1] See annex to Art. 298, clauses 1 and 2.
[2] Art. 297 (*b*).
[3] Art. 297 (*e*) and annex, clause 4.
[4] Art. 243 (*a*).
[5] Art. 297 (*i*).
[6] Art. 306.
[7] Art. 299.

The provisions of this part of the Treaty, which have received statutory force,[1] are intricate enough, and raise quite a new set of problems. But it must already be apparent, and that is sufficient for our present purpose, that they do not reverse or modify in principle the consequences which the war brought upon alien enemies and their property within the realm. It is good, therefore, that Mr. McNair should have recapitulated them, and marked changes and developments which are likely to endure.

PRIVATE LAW IN CHINA.

[Contributed by J. E. G. DE MONTMORENCY, ESQ.]

IT is a truism that matters of far-reaching significance in any country at moments of transition are often obscured by what seem to be changes or even revolutions occupying the attention of most observers. The winter wheat just germinating seems less important than the tempestuous weather of the dark season. China, for the past half-century or more, has been passing through the winter of her discontent: she has suffered much at the hands of ambitious and unscrupulous foreign Powers. The integrity of her dominions has been infringed by most of the Great Powers. She has lost Korea and has, under the name of leases, temporarily at least, lost important trading areas in the most favourable positions. She has lost something of her autonomy in the process of the development of her internal resources. She has suffered greatly from internal dissensions—revolutions which in fact have given foreign Powers some claim to intervene. But the dark period has not been all loss. The activities of foreign merchants and of foreign financiers anxious to develop the exhaustless resources of China have taught the Chinese that they, if they are united and educated, can do those things far better for themselves. Foreign intervention has taught them the significance of western methods of co-operation. It has enabled them to claim from the Great Powers of the West guarantees of territorial integrity for the future. It has given them a number of native thinkers fully familiar with the highest western ideals as expressed in literature and law, and it has created a Chinese school of lawyers who realise that the establishment of the rule of law is a condition precedent to the uprising of China as a world-power.

Civil Procedure.—Little is known in Europe except among a few specialists of the practical side of this legal revolution, though students of Chinese philosophy could have no doubt that, as soon as a competent system of legal procedure is evolved, the subtle and powerful Chinese

[1] See Treaty of Peace Order, 1919.

brain, applying the inherited humanism of unnumbered centuries, will develop a system of law second to none other in the world. The point of practical interest is that the system of legal procedure has been created and is at work, despite the apparent chaos which obscures the real China from the observer. A number of documents relating to the uprising of a legal system based on ancient and modern western principles have recently been translated into English and published through the efforts of Mr. Justice F. T. Cheng, who was the first Chinese doctor of laws in the University of London, and is not only an English barrister and a member of the Chinese Supreme Court, but is thoroughly conversant with English and international law and is the author of a learned work on private international law as administered in the English Courts. It will be convenient briefly to refer to those publications. A Supreme Court of Judicature was founded in China during the last years of the late Tsing Dynasty, but judicial reforms were impossible until after the foundation of the Republic of China in the year 1912. Concise statistics relating to the Supreme Court from 1912 to 1918 have now been issued in English by the Registrar's Department. It is claimed that during this period "much has been done in securing the independence of the Judiciary. The procedure as well as the internal organisation of the Court has also been entirely reformed." Tables are published showing this organisation, showing the power of the Court, its equality with the Ministry of Justice which is responsible for the administration of justice throughout the country, showing that the judges are without exception men of special legal training capable of dealing with final appeals in civil and criminal cases. The rules relating to procedure are still framed by the Court, as the draft codes of civil and criminal procedure are as yet only in part promulgated, but the procedure as framed for trial by written petition seems simple and effective, and justice is not limited by procedural form. Even more detailed statistics than those contained in the twenty-eight tables here printed are promised for the future. In the six years over 15,000 final appeals in civil and criminal cases were disposed of by the Supreme Court. A Court so engaged, with substantial but not unreasonable arrears, is evidence that the rule of law is beginning to come into universal operation, and that both the Ministry of Justice and the Supreme Court are national realities. The translation of the statistics was only one of Mr. Justice Cheng's many activities. In 1919 he published in an English form the Supreme Court Regulations of China. These Regulations were due to Yau Tseng, the President of the Supreme Court, who, being anxious to improve the original regulations, which were "rather rudimentary and provisional in character," examined the practice and usage of the Court, consulted the latest enactments of other countries, and drew up the new regulations (consisting of 230 articles) which were passed at a special meeting of the

chiefs of the divisions of the Court and all the judges. The new regulations were duly approved by the President, and are now in force. The independence of the Supreme Court is specially safeguarded. The dates of sittings are fixed by the President in consultation with the chiefs of the divisions. It is specially provided that judgments in cases in which foreigners are involved shall be published in the Government *Gazette*. It is unnecessary in this place to consider the elaborate detail of those regulations, but it may be said that they are of the most practical kind and deliberately aim at avoiding the complexities and difficulties exhibited by the practice of other countries. Thus Article 79 provides that:

> In the last week of every even month the Civil Divisions shall, in respect of any doubt arising from any law resulting from any decision or interpretation in civil cases, or arising from any statute or ordinance, or in respect of the enforcement of any statute or ordinance by lower Courts, convene a joint meeting among themselves for discussion . . . Copies of the minutes of resolutions passed by such meetings may, if the President of Court considers it necessary, be sent to all Courts and judicial departments of lower rank, and/or to administrative departments possessing judicial powers.

A provision of this type shows the practical character of the regulations and the intention of the Court to prevent the arising of confusion either in adjective or substantive or administrative law by the piling up of inconsistent precedents. The Court itself prescribes the form of pleadings or documents used in the proceedings before it. These regulations are not the equivalent of the English *Annual Practice*, though the volume contains much of the material contained in an edition of the English *Rules of Court*. It is perhaps early days yet to look for a pure practice book indicating procedure with illustrative cases. The Supreme Court is, of course, a Court of Appeal, though it is charged with other duties. The documents in civil cases consist of a Statement of Appeal, and a Reply, and these, with the records of the case and all necessary supplementary documents, are considered by the judge, who, after investigation, reports to the Chief of the Division whether in his opinion it is a case to be dealt with, and, if so, in what fashion. The chief decides the course to be adopted and the judge in charge reinvestigates and reports. If the case is one that, according to the rules of procedure, should be orally tried and assigned in Court the date is fixed by the judges in charge. When the argument is concluded the judge in charge proceeds to reinvestigate the case and submits a report to the Chief of the Division, which, where the chief directs, is in writing. The judges of the division then meet, discuss and decide the case. The procedure laid down in the regulations is somewhat elaborate, but a large number of cases are swept away on the preliminary investigation, while in all

substantial cases the fullest consideration at the hands of several judges is secured, and technical objections cannot hinder a decision. However, it is not proposed here to attempt to describe the procedure in detail. The goal aimed at is the creation of machinery which will secure a full consideration of cases that deserve further legal discussion while discouraging in every possible way frivolous appeals. Whether the machinery is satisfactory for this purpose it is impossible to say, but the procedure was devised by the actual judges who are using it, and if it be ineffective no doubt it will be modified.

Judicial Decisions.—The preliminary work of the judge in charge of a case seems to be very heavy and responsible, and in these circumstances it is certainly necessary to have judges of the highest legal training. That it is the determination to have men of this type is shown by the fact that Dr. Cheng has been appointed a judge of the Supreme Court. This is stated in a further volume from his pen entitled *The Chinese Supreme Court Decisions*, with a preface by Yau Tseng, the President of the Court. This instalment of what is evidently designed as a larger English work containing the practice of the Court as laid down in actual decisions of that Court deals only with cases relating to the general principles of civil law and commercial law. The President, in his preface, writes:

> In days of the old régime civil cases were decided more like by arbitration than by a judicial process; for, except the law of succession and marriage, there was hardly any law to go by; while in criminal cases decisions could be based on analogy and the judge was even allowed to make punishable an act which in his opinion should not have been done, though it had not expressly been made an offence by law. Since the establishment of the Republic, however, the Supreme Court strictly abides by the law. When, at times, the law is found to be defective or inconsistent with the spirit of the age, a remedy, if possible, is effected through interpretation, and where there is no law to go by at all, a precedent is created, having first considered the special conditions of the country as well as legal principles.

This is likely to be an historic statement in the history of Chinese law. It summarises the process which has gone to the making of common law in Europe and especially in England, and it gives the guarantee that the rule of law is the guide of the Court and the safeguard of all subjects of the Republic. Mr. Justice Cheng, in his preface to his translation, claims that the decisions of the Supreme Court "may be compared to those of the House of Lords or the Judicial Committee of the Privy Council of England," and, since the Civil Code is not yet promulgated, these decisions in civil matters form a body of rules repeatedly applied, "the unwritten law of China is the judicial sense of the term." Case law was not formerly unknown in China, "but it related to facts rather

than principles, and mostly concerned crimes," since the judicial, as distinct from the administrative officer, is a comparatively modern idea in China. "Punishment of the criminal could be accomplished incidentally to the exercise of administrative functions, while the State took little interest in civil disputes." Such disputes "were often settled in the chapels or temples in the case of country folks, and in the chambers of commerce or guilds in the case of city men." Mr. Justice Cheng claims that the principles applied in the decisions, though they bear traces of western jurisprudence, are as much the possession of China as of the West: "Those principles of law which are fundamental to the notion of justice have really no nationality." The first rule laid down by the Supreme Court, "Civil cases are decided first according to express provisions of law; in the absence of express provisions, then according to customs; and, in the absence of customs, then according to legal principles," certainly must have led, as Mr. Justice Cheng points out, to the adoption of western legal principles in order to solve "the many new problems arising from the slow but sure development of the country, the growth of new industries, the adoption of various new modes of life, and the springing up of new institutions." Mr. Justice Cheng frankly admits that "the declaration of these principles is, no doubt, judicial legislation," and he asks for criticism of the decisions recorded. That task cannot be undertaken here and now. The results of the decisions are thrown into the form of what is practically a Code of Civil Law, and the document is in itself a bold juridical achievement, with a definite place in the history of comparative law.

Code of Judge-made Law.—Nothing quite like it has ever happened before, and the Supreme Court, in binding itself and the Courts of First Instance by a code constructed in the most scientific fashion out of material supplied by its own decisions has boldly cut through the ancient controversy as to judge-made law. This action confirms the view expressed earlier in this article that the Chinese juridical mind would develop in new and notable directions. That is perhaps the fascination of these documents. Mr. Justice Cheng enables English lawyers to watch over the birth of an entirely new legal system in which the processes which worked so slowly in the upbuilding of our western jurisprudence, so slowly and so unconsciously, are consciously brought into operation with the intention of securing *per saltum* a legal system comparable with the law of Rome or the Common Law of England. To achieve this, not by legislative or administrative but by direct judicial action, was a departure which has no parallel in the history of law. To the student of comparative law it marks a new phase and a new grasp of juridical possibilities, and this achievement is due to those who combine the essential subtlety of Chinese metaphysics with a broad grasp of the legal principles underlying the slow evolution of the laws and the

equitable jurisprudence of Rome and Britain. I am not concerned for the moment with the soundness of the principles laid down, though I am not venturing to criticise those decisions. I am concerned with the fact that a law for regulating the civil relations of 400,000,000 of people has been in effect promulgated by a judicial tribunal as the result of the actual decisions of that tribunal. It was obviously desirable that a process of such great juridical interest should be brought to the notice of jurists of the western world. It was no easy task, as Mr. Justice Cheng's remarks on the subject indicate. He writes:

> The task has not been a simple one. Owing to the inherent flexibleness of the Chinese language as well as to the newness of the legal phraseology adopted in our reformed law, translation often means interpretation as well. The task is further complicated by the fact that all the technical expressions have to be settled for the first time. But the task is one that must be performed sooner or later. China has moved a long way towards establishing her international status. . . . In 1919 her delegates sat at the conference table in Paris as a matter of right. The number of foreigners who come directly under our jurisdiction, too, is increased year by year, and we are, moreover, confident that our treaties made with the Great Powers with promises to withdraw their consular jurisdiction are no "scraps of paper." For these reasons our law must be rendered in some language intelligible to the foreigners; and there is another reason, and that is, a law that concerns 400,000,000 of people cannot be a matter of indifference at least to the juridical world. In this, as in a few others I have attempted, I have taken great pains to render the translation as faithful as possible, and, remembering the many difficulties I have experienced, I shall consider my labour amply repaid if I only succeed in lightening the task of those who may translate our law in future.

It would be almost as great a liberty to congratulate the learned judge upon his English as upon his law. I could only wish that all English writers wrote with his ease of diction and accuracy in expressing delicate distinctions of meaning. It is not the object of this brief article to analyse the new Chinese law, whether it be adjective or substantive law. The object is to draw attention to an almost unprecedented development in the brief space of seven years. The development of Japan, politically, economically and juridically has long been a subject for comment and grateful surprise, and the development of China may prove not less swift and dramatic. But that development springs from a different and it may be a more deep-rooted method. In the midst of what must seem to most observers a condition of political chaos we see the deep foundations of the future being laid by a system of law which is not a mere code passed by a political authority intent on showing a fair face to the world, but is a system based on the experience during seven years of thousands of appellate decisions from all

parts of an empire comprising 400,000,000 of people. The legal system is itself based on a Rule of Law which seems to have received general acceptance from all classes and parties of the people.

Prize Court Decisions.—That the creation of a legal system is not being hurried is evident from the fact that the Civil Code has not yet been promulgated, its place at present being filled by the codified decisions of the Supreme Court referred to above, and to some small extent by the Civil provisions drawn from the Criminal Code promulgated by the Tsing Dynasty. Part I of the Draft Code of Criminal Procedure of 1910, dealing with jurisdiction, parties, and procedural acts was promulgated by the Republic on April 7, 1912. The parts dealing with trials, appeals, and execution are still in draft, and Mr. Justice Cheng, in his valuable translation of the whole code, indicates this fact. The whole code, indeed, is under revision. One further translation by the learned judge must be referred to—his volume containing the judgments of the High Prize Court of the Republic of China during the war. The judgments in fifteen cases are set out, and these decisions are sufficient evidence of the wide knowledge of legal principles at the disposal of the Court. Few more interesting documents in the history of the law from the juridical side can be found and the decisions of the Chinese High Prize Court will doubtless be quoted in other international Courts should occasion arise. It may indeed be that China in other regions than Prize Law will have contributions to make to the jurisprudence of the world. It is significant that the judges have special knowledge of international law both in its public and its private aspects.

SHIPS AND THEIR OWNERS IN THE PRIZE COURTS OF FRANCE, GREAT BRITAIN, ITALY, AND CHINA.

[*Contributed by* C. J. Colombos, Esq.]

At a time when prize proceedings in relation to the late war are, happily, drawing to a close, it is interesting to note that the new elements which have been introduced into prize law constitute much less an innovation than a development of previously existing well-known rules. It is confidently expected that the League of Nations will succeed in adapting the machinery of the newly instituted Hague Court to the establishment of an International Tribunal of appeal for prize cases and that the uniformity in this branch of the law of nations will be permanently secured in the future.

Enemy Ships in Neutral Territorial Waters.—The *Tinos*, *Bogados*, and eleven other German and Austrian ships were seized in September 1916, whilst lying in Greek roadsteads. The enemy nationality of these

vessels was duly established, but the shipowners contested the validity of capture on the technical ground that it had taken place in the territorial jurisdiction of a neutral State, and was consequently, in accordance with the provisions of Art. 2 of the Thirteenth Hague Convention, 1907, null and void. This argument would, undoubtedly, have had some force if made by others than German and Austrian nationals. The chronological history of the war showed, in fact, that it was Germany and her Allies who had first converted the Greek territorial waters into a theatre of war and a base of naval operations, in violation of Art. 5 of the same Hague Convention. The effect of this violation had been the complete withdrawal from the neutral territorial waters of the privilege, which they had under international law, of conferring an asylum to the vessels of the belligerent powers.[1] The same principle has been adopted and acted upon in recent wars by the Prize Courts of other countries. In the cases of the Russian ships *Ekaterinoslav* and *Mukden*, tried in 1905 in the course of the Russo-Japanese War, the decisions of the Prize Court of Sasebo and the High Prize Court of Japan on appeal were that, the neutrality of the Korean boundary waters, having been violated by Russia, could not afford any protection to the latter Power's merchantmen.[2]

There was a further point which the French Prize Court has not raised in the case of the *Tinos*, viz. whether enemy shipowners are entitled to appear for the purpose of suggesting the invalidity of a seizure made within the maritime territorial limits of a neutral State, when the State concerned does not enter a formal protest against the violation of its rights. Sir Samuel Evans laid down the fixed principle that—

> No proposition in international law is clearer or more surely established than that a capture within the territorial waters of a neutral is, as between enemy belligerents, for all purposes rightful. It can be only declared void as to the neutral State and not as to the enemy. The provisions of Convention XIII of the Hague Conference, 1907, were only directed to the relations between neutral Powers and belligerent Powers, and did not affect the rule relating to capture in territorial waters of a neutral State, as between the belligerent Powers, where the neutral State did not intervene.[3]

This proposition is evidently founded on the principle that the neutral Power alone has been injured by the seizure. A captor is, therefore, obliged to restore on application of the neutral State. The judgment of Lord Sterndale in the *Pellworm* proceeded on the consideration that,

[1] Decision of November 29, 1917 (*Journal Officiel*, January 9, 1918, p. 401).

[2] 2 *Russian and Japanese Prize Cases*, p. 4 *et seq.*; Marstrand-Mechlenburg, *Das Japanische Prisenrecht*, p. 51 *et seq.*

[3] The *Bangor*, [1916] 32 T.L.R., p. 590.

the act of seizure having been completed in Dutch territorial waters, there was a violation of neutrality and the vessel must be released in deference to the Dutch Government's intervention.[1]

Enemy Ships captured after Conclusion of Armistice.—Some interesting points were discussed in the case of the German steamship *Elbe*, captured in the Baltic Sea after the signature of the Armistice of November 11, 1918. The German Government and shipowners opposed with a plea founded on Art. 20 of the Armistice which decreed the immediate cessation of all hostilities at sea. It is true that Art. 26 directs that the existing blockade conditions set up by the Allied and Associated Powers shall remain unchanged, but the Germans contended that these provisions could not apply to the Baltic Sea, where no blockade had ever existed. The Court held that, under Art. 26, all German merchant ships met at sea were, without any discrimination as regards origin, destination, or place of seizure, liable to capture. Only the regular delivery of a pass or licence by the allied authorities could exempt these vessels from seizure, and, as no such pass had been delivered to the *Elbe*, this ship must be condemned.[2]

Enemy Yachts.—In the case of the Austrian pleasure yacht, *Tolna*, the Court ruled that Art. 2 of the Sixth Hague Convention, 1907, exempting from confiscation enemy merchant ships which had been unable to leave within the prescribed delays, could not be extended to yachts. The provisions of the Convention had been manifestly taken in the interests of the world's commerce, and had clearly the character of a measure of favour. They were, therefore, only applicable to merchant ships.[3]

The same interpretation was given by Sir Samuel Evans in the *Germania*, where he decided that "the preamble of the Hague VI Convention indicates that the purpose of the convention is the security of international commerce. A vessel which is of no value or utility for any commercial purpose is not in any sense a merchant ship or entitled to the protection of the convention."[4]

Unneutral Service.—The Norwegian sailing vessel *Leif Gundersen* was seized whilst on a voyage from Baltimore to Denmark. She had been employed for carrying a considerable number of despatches sent by German diplomatic and consular agents accredited in Cuba and Brazil to the Foreign Office at Berlin. Diplomatic despatches are, as such, exempted from capture,[5] but, as it was found that they had been

[1] [1919] 35 T.L R., p. 719.

[2] October 10, 1919 (*Journal Officiel*, November 7, 1919, p. 12507. Same decisions in the case of the German steamers *Italia* (*ib.* p. 12508) and *Möwe* (*ib.* April 29, 1920, p. 6501)

[3] May 6, 1920 (*Journal Officiel*, June 15, 1920, p. 4899).

[4] [1915] 32 T.L.R. p. 68; affirmed on appeal (1917) 33 T.L.R , 273.

[5] Lord Stowell in the *Caroline* (1808), 6 C. Rob. 461.

written with a belligerent purpose and that a good proportion of them were simply propagandist pamphlets in the enemy's interest, the Court held that the *Leif Gundersen* was engaged in a service having for its object the assistance of the enemy in the prosecution of war.[1]

In the case of the Japanese steamship *Iro-Maru*, evidence showed that she was carrying on board a German Consul accredited at China, who had tried to conceal his identity under a neutral nationality. Lord Stowell's decision in the *Madison*[2] was that the ship should be restored, as an enemy Consul resident in a neutral State for the purpose of supporting an amicable relation with it was in a privileged position. In the case of the *Iro-Maru*, however, it was established that the German Consul was acting as a Government agent for the transmission of belligerent intelligence. As the vessel had been specially chartered for the conveyance of this noxious enemy agent, she was condemned.[3]

The correct finding of the Court in the *Adelphotis*, a Greek sailing vessel, was that she was taking part in the hostilities by supplying petrol to German submarines encountered on her voyage from Salonika to Piræus. This finding was confirmed by the very abnormal route which the vessel was following in deviation from her course and by the considerable and unjustifiable voids which were detected in her cargo.[4]

The Italian Prize Court has likewise decided, in the case of the Albanian steamer *La Bella Scutarina*,[5] that a neutral ship is guilty of hostile assistance and, as such, validly seized and confiscated when not employed in permissible commercial voyages, but is engaged for the purpose of communicating warlike intelligence and for the supply of petrol and other stores to enemy submarines and hydroplanes.

Spoliation of Papers.—There was a flagrant destruction of documents in the case of the Spanish vessel *Alphonso XIII*, whose charterer, who had been inscribed as a member of the crew under a false name, threw overboard the ship's papers immediately on the approach of the visiting cruiser. Art. 3 of the *Règlement* of July 26, 1778, decrees a vessel, whether of neutral or allied nationality, to be good prize if it is ascertained that her papers had been thrown into the sea or otherwise suppressed or destroyed. These facts are sufficiently compromising and justify an inference of guilt unless, by application of the Royal Letters Patent of November 13, 1779, evidence is produced that the destruction of papers had not been effected with the express object of dissimulating the enemy ownership, destination, or affectation of the ship. In the present case there was, on the contrary, the strongest proof that the

[1] December 19, 1918 (*Journal Officiel*, January 1818, 1919, p. 709).
[2] [1810] 1 Edwards, 224.
[3] November 30, 1916 (*Journal Officiel*, December 25, 1916, p. 11101).
[4] November 8, 1917 (*ib.* December 13, 1917, p. 10141).
[5] May 4, 1916 (*Gazetta Ufficiale*, May 25, 1916, No. 123).

ship's documents had been thrown overboard for the purpose of hiding the true nature of a voyage undertaken in the enemy's interest.[1]

A similar spoliation of papers occurred in the case of the Norwegian steamer *Bangor* before the British Prize Court, when the President's finding was that the master had fraudulently thrown the ship's papers overboard and burnt the record of wireless messages and other documents. The false evidence of the master constituted a further aggravating circumstance.[2]

Carriage of Contraband.—The Greek vessel *Zoodochos-Pighi* and her freight of coal were captured in Turkish waters on August 31, 1915. She was condemned under Art. 40 of the Declaration of London, 1909 (in force at time of seizure), which subjects to confiscation neutral vessels carrying contraband which, reckoned by value, weight, volume, or freight, forms more than half of the cargo.[3]

The same view was taken by the Italian Prize Court in the case of the Greek steamship *Kyzicos* [4] and the German Prize Courts in the case of the Dutch steamship *Batavier II*.[5]

It is well known that, when formally repealing the provisions of the Declaration of London, the British and French Governments announced their intention of observing, in all prize proceedings, the historic and admitted principles of international law generally recognised at the time immediately preceding the summoning of the Naval Conference of London (*Maritime Rights Order in Council*, 1916, and French decree of July 7, 1916). This meant for France the return to the old rule of the *Règlement* of July 26, 1778, which does not confiscate a vessel unless at least three-quarters of her cargo consist of contraband goods. This practice, however, was evidently too lenient as regards neutrals, and did not correspond to the quantitative tests fixed by the other leading maritime Powers,[6] so that the decree of July 7, 1916, expressly adopted the half-contraband principle.

As Sir Samuel Evans decided in the *Hakan* (condemned for carrying a full cargo of contraband) the attitude and action of the most important maritime States before and since 1908 have been such as to justify the Prize Court in accepting as forming part of the law of nations at the present day the rule of the Declaration of London.[7] The voyage of the *Hakan* was to an enemy port, but Sir S. Evans held in the case of the *Maracaibo* that the practice should be extended to vessels travel-

[1] May 10, 1917 (*Journal Officiel*, June 6, 1917, p. 4422).

[2] [1916] 32 T L.R p 590.

[3] October 19, 1916 (*Journal Officiel*, November 29, 1916, p. 10365).

[4] May 6, 1916 (*Gazetta Officiale*, May 24, 1916, No 122).

[5] February 16, 1917, affirmed on appeal, September 21, 1917. *Grotius, Annuaire International*, 1917, p. 218 and 230.

[6] Memoranda of the Powers in *Proc. of Int. Naval Conf., London*, pp. 2–53

[7] [1916] 32 T.L.R., 639; affirmed on appeal (1917) 34 T L.R. 11.

ling to a neutral port by application of the doctrine of continuous voyage.

If a vessel proceeding to a neutral port carries such a cargo as is properly captured as prize because it is absolute or conditional contraband, destined ultimately for enemy territory, or for enemy forces, or bases of supply, the offence of the vessel is the same as if she were carrying conditional contraband to an enemy port.[1]

The decision of the French Prize Court in the case of the *Zoodochos-Pighi* is silent as regards the knowledge of the master or shipowner about the contraband nature of the vessel's cargo, a fact which seems to imply that this knowledge is unnecessary in French jurisprudence and that the fate of the ship is made to depend upon the quantity of contraband carried. The same view was taken up by Sir Samuel Evans:

The practical rule, adopted in the *Hakan*, of making the quantitative or qualitative extent of the contraband the test, instead of knowledge, avoids the necessity of the Courts embarking upon the very difficult and often unsatisfactory inquiry into the state of mind or extent of information of the persons concerned.[2]

The Privy Council, however, have rejected this interpretation by deciding that there can be no confiscation without knowledge on the part of the owner, or possibly of the charterer or master, of the nature of the cargo.[3] The present President, Sir Henry Duke, has proceeded on the same lines in the condemnation of the *Kim* and two other Norwegian ships:

In each of the present cases the master knew all the material facts at all material times and was actively concerned in his own ship's part in an enterprise which was calculated and designed to give vital assistance to the enemy by the carriage of over half contraband. The charterer organised and conducted the enterprise. The owners are proved to have had knowledge of the voyage.[4]

National Ships.—According to French practice, a national ship can never be confiscated. Even if naturalisation be withdrawn from the vessel after capture, it is nevertheless necessary that a new seizure be validly effected before the adjudication and condemnation can be legally proceeded with by the Court. Several French steamers were being

[1] [1916] 33 T.L.R. 48.
[2] The *Maracaibo*, *ib.*
[3] The *Hakan* (1917), 34 T.L.R., 11.
[4] The *Kim*; the *Bjornstjerne Björnson*; the *Alfred Nobel*, decision of April 28, 1920. Transcript from the official shorthand notes.

used before the war as tenders in or about Cherbourg for the big German liners. As these vessels had, since 1895, duly obtained French registration, their first seizure had been declared void by the Court.[1] A fresh seizure took place shortly afterwards, and it was found that these ships, although apparently the property of French citizens, were, in reality, owned by German subjects. They were accordingly condemned by application of the Marine Ordinance of 1681 which rules that a ship must be considered as good prize in all cases where the title of ownership is vested in enemy subjects. (Steamers *Ariadne, Bon Voyage, Willkommen, Lloyd, Flamanville.*)[2]

Sir Samuel Evans, in distinct variation from this rule, did not consider, in the case of the *St. Tudno,* that a new writ of seizure was necessary for pronouncing confiscation on a British ship registered as such long before the outbreak of war.

> In my opinion in this Court of Prize, I have a right and am bound to look at something beyond the nominal ownership. Apart from technicalities, can anybody say this ship belonged to a British company? If it did in name belong to a British company, that covering was the merest shell, and I must break through it in order to ascertain who the real owners of the ship were. There can be no doubt that the real owners are the German Steamship line.[3]

Transfer of Flags of Enemy Ships.—Many interesting questions as regards the right to a flag were determined in the case of the *Solveig,* which had arrived at Marseilles from the Dutch East Indies under the Norwegian flag. She had been successively sold *in transitu* to a Danish and then to an American shipowner. The American Consul, however, had expressly refused to recognise on June 22, 1915, viz. six days before capture, this vessel as American. The American registration was only granted on August 13, 1915, but, according to the French invariable rule, this registration could have no effect, as it had been made after the ship's seizure. Art. 2 of the *Règlement* of July 26, 1778, decrees that it is incumbent on the masters of neutral vessels to justify the neutral ownership of their vessels. Art. 53 of the *Arrêté* of 2 prairial in the year XI (1803), on the other hand, provides for the condemnation of the ships whose neutrality has not been established in accordance with the regulations and treaties in force. There was no doubt that the effective control and ownership of the *Solveig* was in German hands, and the vessel was condemned.[4]

[1] *Vide Journ. Comp. Leg.*, vol. xvi. (July 1916), p. 305.

[2] *Journal Officiel,* Aug 7 and Sept. 6, 1916, pp. 7152 and 7993; Feb. 24, and March 21, 1917, pp. 1495 and 2285.

[3] [1916] *Br. & Col. Prize Cases,* vol. ii, p. 272. Cf. the *Hamborn* (1917), 34 T.L.R. 145, affirmed on appeal (1919), 35 T.L.R. 726, and the *Proton* (1918), 34 T.L.R. 309.

[4] Oct. 8, 1915 (*Journal Officiel,* November 12, 1915, p. 8154).

The High Prize Court of the Republic of China has also decided that an enemy ship transferred to persons domiciled in China or in a neutral State before the war, but in anticipation of its outbreak, is an enemy ship, unless the transfer has been made in good faith and has been completed by carrying out the intentions of the parties to the sale in compliance with all legal formalities. A ship being moveable property, delivery of possession is essential to the transfer of her ownership (German steamer *Fortuna* and Austrian steamers *Silesia, China,* and *Bohemia*).[1]

A curious point arose before the French Prize Court in the case of the German steamer *Corcovado,* which was sold, under the name of *Souhl,* to an Ottoman Government company shortly after the conclusion of the Armistice between the Allies and Turkey on October 30, 1918. This transfer was clearly a violation of Art. 23 of the said Armistice binding Turkey to cease all relations with the Central Powers. It was, further, ascertained that the sale had been made in order to elude the consequences of capture to which German ships were subjected. It constituted equally an injury to the Allies' interests, as, in terms of Art. 29 of the Armistice with Germany, this latter State had agreed to abandon in the Black Sea all her merchant crafts, tugs, and barges, an expression which, according to the Court's interpretation, included merchant ships. It was consequently by a fraudulent and fictitious transfer of flag that the *Corcovado* had been able to quit the port of Odessa in the Black Sea.[2]

It is evident, on the other hand, that a transfer not resorted to with the object of avoiding the results of enemy nationality is, to all purposes, valid. (American steamers *Virginia* and *Indiana.*)[3]

In the case of the schooner *Leonor,* captured on the coast of Mexico, the President of the British Prize Court (Sir Henry Duke) did not accept the Crown's claim that the vessel was enemy property before or during the war, as her incomplete process of transfer was not an effective divestment of enemy title and an effective vesting of the title of property in the neutral owner. No question arose here with regard to a transfer *in transitu,* as the vessel was transferred when in a neutral port. As the *Leonor* had at all times been engaged in the Mexican coasting trade, her change of ownership did not imply a new or illegal service, and looking at all the facts of the case, the conclusion was that the transfer had not been effected with the intention of eluding capture.[4]

Coastal Fishing Boats.—The doctrine of the immunity of fishing boats from capture as prize of war is mainly founded upon an immemorial French practice (Ordinances of 1543 and 1584) accepted, at an early

[1] *Judgments of the High Prize Court of the Republic of China,* translated by F. T. Cheng, 1919, pp. 68, 88, 97 and 110

[2] October 18, 1919 (*Journal Officiel,* November 7, 1919, p. 12510).

[3] May 6, 1916 (*Journal Officiel,* June 30 and July 3, 1916, pp 5750 and 5883).

[4] January 15, 1920. Transcript from the official shorthand notes

date, by all the civilised nations as a well-recognised rule of international law. By general consent, this principle was embodied in Art. 3 of the Eleventh Hague Convention, 1907, on the condition, however, that these vessels should rigorously abstain from taking any part in the hostilities. In the cases of the two Turkish schooners bearing the same name, *Marbrouck*,[1] and the Greek sailing vessel *Evanghelistria*,[2] the Court decreed condemnation on the ground that all these vessels had been employed in revictualling the blockaded ports of Syria and Asia Minor.

They cease, likewise, to be exempted from capture when, by reason of their size, equipment, or voyage, they can be properly classed as deep-sea fishing ships engaged in a commercial enterprise which forms part of the trade of the enemy country (Sir Samuel Evans in the case of the German sailing cutter *Berlin*).[3]

Recapture.—In conclusion note may be made of a novel point in international law. It is an old principle that the recapture or rescue of a national vessel by a belligerent Power from her opponent, before judgment of condemnation has been pronounced, revests the property of the vessel in the original owner. The German steamer *Dacia* had been condemned by the French Prize Court[4] after having been torpedoed by a German submarine whilst employed, by the French Admiralty, as a transport in the Near East. In the presence of the assertion of the German Prize Courts that all enemy and neutral vessels sunk by German cruisers or submarines are properly and validly captured when their destruction is justified by naval necessities,[5] it would appear that the French Court was not entitled to proceed to the adjudication of the *Dacia*, since her ownership had been restored to the original proprietor. In the case of the American steamer *Indiana*, sunk under identical circumstances, the Court was not stopped by this consideration from delivering its considered judgment.[6] No mention, however, was made in either of these cases of the fact that the vessels had been sunk, which seems to imply that the Court decided to ignore completely their destruction. It is true that, in the case of the *Indiana*, the Court was before a neutral vessel which Germany could not have recaptured and which she had destroyed in violation of international law.

[1] May 30, 1918 (*Journal Officiel*, June 25, 1918, p. 5506).

[2] April 18, 1918 (*ib.* May 17, p. 4360).

[3] (1914) 31 T.L.R 38. Cf. Sailing trawler *Stoer* (March 23, 1916), Transcript from the official shorthand notes.

[4] *Journal Officiel*, August 26, 1915, p. 5994.

[5] British steamer the *Glitra*, Imperial Supreme Prize Court in Berlin, Sept. 17, 1915 (*Zeitschrift fur Volkerrecht*, 1916, p. 399); Dutch vessels *Elzina Helena* and *Antwerpen*, Prize Court in Hamburg, December 8, 1916, and July 6, 1917 (*Grotius, Annuaire International*, 1917, pp. 213 and 214).

[6] May 6, 1916 (*Journal Officiel*, July 3, 1916, p. 5883).

JUSTICE AND THE POOR.

[*Contributed by* H. M. ALDERSON SMITH, ESQ.]

CIVILISATION has many disadvantages, among which must be counted the growing number and complexity of the rights of individuals. As civilisation advances, so do the rights of the citizen multiply until it becomes impossible for the ordinary layman to know them, or, knowing, to define, much less enforce them. The State regulates his rights and regulates his enforcement of them. It naturally follows that there has grown up a class of men making a special study of the rights of the citizen and of the methods laid down by the State for their exercise and enforcement. As this class is the outcome of the action of the State, made necessary by its methods, and rendered indispensable by its inherent nature, Mr. Heber Smith, in his report to the Carnegie Endowment upon "Justice and the Poor,"[1] argues that this class of specialists should be at the service of all citizens, rich and poor, irrespective of whether or not they are capable of paying for the services rendered.

The idea may sound Utopian to the uninformed, but it is a principle which has been accepted in most civilised countries in some form or other. In his treatise Mr. Smith shows how the principle is acted upon in the United States of America, and how the methods at present adopted for its furtherance might and should be made more complete. He has, however, a tendency to dwell with too great insistence on the litigious side of the question, often, apparently, forgetting that it is only a minority who ever have cause to bring the adjudication or enforcement of their rights before a court of law, whereas, at some period of their lives, many have to seek advice either as to the definition of their rights, or by way of arbitration quite apart from that form of arbitration exercised by the Courts. It is in this latter form that it is desirable that the lawyer should be made more available to the poor man, and it is in this same way that the systems adopted by the State fail to satisfy the want.

Mr. Smith foresees a time when the Legal Aid Associations of the United States will be taken over by the Government. However that might operate in America, it is very doubtful whether a similar development would be welcomed in this country. In these days, when anyone seeks advice, he wishes to go to some independent person, not hemmed in by the rules and regulations and that air of mystery and statistics that surrounds a Government office. He does not wish to make his case known to a public body, but to a private individual.

[1] *Justice and the Poor.* A study of the present denial of justice to the poor, and of the agencies making more equal their position before the law, with particular reference to legal aid work in the United States. By Reginald Heber Smith (New York: Carnegie Endowment for the Advancement of Teaching).

There is, however, much to be said in favour of a centralising of the efforts of Legal Aid Associations and similar bodies. Such centralisation would increase power, enable definite statistics to be compiled, and, with proper organisation, increase efficiency. The Legal Aid Associations of America and the corresponding institution in this country, the Poor Man's Lawyer, are brought into contact with a certain class of the people in perhaps a more intimate manner than any ordinary charitable institution. They see the actual needs of the poor in many departments of life. Their efforts, more especially when they are linked with those of Welfare Societies, are concerned with the actual life of the poor, their material wants, their domestic and business relations. There is before the officials of the Societies no pretence or false sentiment, such as impedes the work of clergy and ordinary charitable institutions. They have hard facts submitted to them, and it is to those facts, and not to some figment of the imagination, that their attention is given. Their clients come to them not for doles, but for the settlement of their affairs. The whole matter therefore rests on a business footing, and by virtue of that basis the officials are able to arrive at a true appreciation of actual conditions.

It naturally follows that, were the records of the Societies systematically compiled, their efforts co-ordinated, and the Societies given some central organisation to which they could refer, and of which they would in fact form part, instead of each Society existing as a separate more or less isolated entity, there would be an opportunity of placing before the heads of Government, when necessary, a statement of the needs of a large class of citizens who now have no means of making their voice heard as a class, and who, if left to their own devices, have neither the ability nor the education to put forward their needs in an intelligible form. Such a statement could then be supported by accurate statistics, and by reference to actual cases, and by this means would be eliminated much of the idle vapourings of the advocates of the cause of the poor, and, at the same time, mistaken legislation for the alleviation of their needs would be avoided.

Among many people at the present time an idea prevails that, with the increased wage received by the unskilled worker of to-day, his need for aid in the ordinary departments of life has decreased if not disappeared. But, to anyone who has sat for an evening in an office of the Poor Man's Lawyer, it is evident that the alteration in conditions only extends to a small section, relatively speaking, of those who, in pre-war days, were wont to seek the services of the Poor Man's Lawyer. The need for services such as those given by him is still great, and, so far as can be seen, the need will continue to exist if not to increase. In one direction his work has increased since the war. The outcrop of matrimonial causes which has been noticeable in the middle and higher classes as a result partly

of hasty and ill-considered marriages contracted during the war, and partly of the loosening of morals which is, in some respects, a natural consequence of the life which has been led by men and women during the last few years, is no less noticeable among the poorer classes.[1] At times, the Poor Man's Lawyer can exercise a healthy mediatory influence in such cases, but more often the only course open to him is to negotiate a separation. From many points of view, it is to be regretted that so much of his time should be taken up with cases of this class; but, on the other hand, if in one case occasionally he can effect reconciliation or some proper understanding that will obviate violence with its resultant police court proceedings and still further lowering of the standards of life of the persons concerned, his work is justified.

In this department of the work the Poor Man's Lawyer, and apparently some of the Legal Aid Associations of the United States, work in co-operation with Welfare Societies, and here is an actual instance of the way in which an institution separate from the State has an advantage. To have a visitor from a Government department, or from a Society associated with a Government Department, would savour, no matter how unjustifiable such an idea might be, too much of something akin to police supervision, whereas a visitor from a Welfare Society acting on the request of the Poor Man's Lawyer can enter a man's house without any such stigma attaching. This system of having visitors connected with the Poor Man's Lawyer is capable of effecting a considerable amount of good. It prevents the work of the Society narrowing itself down too much to a purely business footing. It gives more scope for the human side of legal work. There is always a danger, among the poorer classes, of a barrier being erected between them and the class above them. The visitor helps to break down that barrier or to prevent it from being erected, and in very many cases enables the official of the Society to deal with the case with a better comprehension of its needs and with a truer insight into the circumstances. Moreover, such a combination between the legal adviser and the welfare worker also reacts to the benefit of the latter, for the legal adviser can be a valuable guide to the welfare worker not only in defining the merits of a case and the rights of the parties, but also in pointing out the wisest course to pursue in relation to the parties.

The working man in this country, and no doubt also in other countries, has an enemy just as dangerous, did he but know it, as the loan sharks of which Mr. Heber Smith writes. If there is an institution anywhere against which the poorer working man, and even more his widow and children, need protection, it is his own Provident Society. Were an employer of labour to deal with his workmen in a way comparable to

[1] As to the proportion of matrimonial cases among the poorer classes in the United States, see *American Marriage Vows in their Social Aspects: a Digest.* (New York: Russell Sage Foundation, 1919.)

that in which many of the Provident Societies deal with their members he would find something more than a difficulty in obtaining hands. Let there be the slightest technical defect in a claim, or the smallest suggestion of a loophole by which to escape from their obligations, just if not absolutely legal, many of these Societies are only too ready to take advantage of it as against persons who, in the absence of some legal aid institution, have nowhere to go for advice or assistance, and themselves are too ignorant to counter the action of the Society in question. The work of the Poor Man's Lawyer in this connection cannot fail to be an inestimable benefit to many of the poorer working classes.

Another important aspect of legal aid work with which Mr. Heber Smith deals at some length is its bearing upon the legal profession. Not only is the work of an educative value to the younger members of the profession, but he shows that from early days it has been, and in Scotland still is, recognised as an obligation incumbent on the lawyer no less than on the doctor to care for the poor. In these days this obligation has become largely obscured, and, be it said with regret, many of the profession have entirely lost sight of the fact that they belong to a noble and honourable calling with high ideals and traditions. The various legislative measures dealing with employers' liability and workmen's compensation have been largely responsible for the growth of a class of lawyers looking upon the poor as a fair means to an avaricious end. To this class of lawyers, their clients are themselves, those they profess to serve are merely their tools. With other lawyers, again—and this applies to the great majority, and at all events to all the more eminent members of the profession—it is impossible to spare the time which would be needed to deal adequately with cases where voluntary aid is required. In the one case Legal Aid and kindred associations form a protection and an alternative source of advice to the poor, and in the other a means by which the honourable members of the profession can carry out those obligations which the pressure of their own business prevents them from fulfilling personally.

Not only would the support of Legal Aid Societies by the profession to a fuller and larger extent serve to popularise the profession and establish a greater confidence in reference to it in the minds of the public, but it would have a humanising effect on the members of the profession, enlarge their mental outlook, and bring home to them the fact that they are not only business men, but men with a definite obligation, as noble as that of the medical profession, to the State.

THE REPORT OF THE MERCHANDISE MARKS COMMITTEE.

[*Contributed by the* HON. H. FLETCHER MOULTON.]

FOR some months past a committee has been sitting under the chairmanship of Mr. Harry Greer, M.P., to consider the advisability of changes in the Merchandise Marks Acts, the utility of National Trade Marks, and the necessity for further international action for the prevention of false marking of goods.

After a large number of sittings, and after hearing the evidence of some seventy witnesses from all parts of the Empire, this Committee has published a report [1] of great importance and interest.

Compulsory Marking of Goods.—The first question dealt with in the Report is that of the compulsory marking of goods. Generally the opinion of the Committee is against any compulsory indication of origin. A proposal is, however, made that the Board of Trade should have power to issue orders requiring the origin of certain classes of goods to be indicated, where official inquiry has shown that this is required. This may lead to a number of applications by different classes of manufacturers for orders requiring such indications of origin in the case of goods of the kind which they produce. The object of such applications will be to produce an indirect preference in favour of British-made goods, since the applicants will hope that the public will prefer to buy British goods even at an increased price. If such preference is considered beneficial, it would seem better that it should be enacted by Parliament rather than left to a number of Board of Trade inquiries. The danger in such inquiries is that the restricted class that requires marking in order to handicap foreign competitors is usually better organised and more articulate than the merchants to whom the change may mean a restriction of their source of supply, or than the persons who will ultimately pay for the preference, viz. the British public.

The Report gives little indication as to the classes of goods with regard to which such marking might be thought desirable. A reference is made to cases in which foreign manufacturers deliberately imitate British goods in their form or get-up. In the absence of the evidence, which has not yet been published, it is not possible to say to what special classes of goods this refers, but it would seem strange to wish to penalise foreign manufacturers for making their goods in those forms which the British public have shown that they prefer. In the past it has been made a subject of reproach to British manufacturers that in their export trade they have not sufficiently studied the tastes of the market in which such goods are to be sold, and it would seem hardly consistent that we

[1] Cmd. 760, London: Stationery Office.

should say to foreign manufacturers that they must either avoid fashions which the British public require, or that, if they study the public taste, they will be subjected to compulsory marking.

Another subject which the Committee has considered is the marking of goods to indicate the labour conditions under which they were produced. Here they definitely advise against any such marking, and there would seem little doubt that such advice is right. If such marking is required in the case of home-made goods it would, *a fortiori*, be necessary for foreign goods, and it would seem quite impossible at the present time, in view of the different conditions of living and labour, to determine any standard on which the marking could be based.

Indication of Origin.—The present Merchandise Marks Act is very unsatisfactory on the subject of indication of origin. Generally it may be said that no marking of goods is required unless they bear some mark which would indicate that they are produced in this country. The present Act nowhere says that the use of a British trade mark shall be such an indication, so that its use on foreign goods would constitute an offence unless an indication of foreign origin were also added, but then somewhat illogically proceeds to provide that goods bearing such a trade mark must not be imported unless they bear words that show that they are of foreign origin. It is pointed out in the Committee's Report that such words may afterwards be removed without any offence being committed. The Report recommends that such removal should be made an offence, but it does not deal with the question whether putting a British trade mark on foreign goods should also be an offence. It is difficult to see how it can be logically suggested that the use of a British trade mark is in itself an indication that the goods have been made in this country, in view of the definition in the Trade Marks Act of 1905 that a trade mark should mean a mark used to show that the goods "are the goods of the proprietor of such trade mark by virtue of *manufacture, selection, certification, dealing with or offering for sale.*" Some implication as to origin might be drawn if the mark is that of a manufacturer, but none could be in the case where the proprietor is a dealer in goods which he does not himself manufacture, since the mark merely indicates that he has sold them. But if the trade mark is not an indication of origin, there seems no reason for preventing goods bearing the mark being imported provided that it is placed on them with the dealer's authority. The whole subject should be carefully considered in the drafting of any new Act.

Protection of Foreign Trade Marks.—One of the most useful features of the Report is that the Committee have faced the difficulties affecting legislation for the purpose of protecting foreign trade marks by procedure in the Criminal Courts, or by measures, such as prohibition of importation or seizure, which give the defendant no opportunity of challenging the

validity of the mark. Our civil law very vigilantly protects the public from any improper claim to monopoly in a mark, and more particularly in a word mark. In order to succeed in an action, the plaintiff must either have registered, or bring evidence that the mark has become so associated with his goods by user, that the use of it is understood to mean that the goods are his, either throughout the kingdom, or at any rate in that portion of the kingdom where the defendant trades. Even if the mark has been registered the defendant may attack its validity, unless it has been on the register for seven years. It would seem unthinkable that rights should be enforced criminally without giving the defendant at least as good an opportunity of challenging those rights as he would have in the Civil Courts. Yet, if a criminal prosecution may be brought for the use of a mark merely because that mark is protected in a foreign country, the defendant is powerless, since there is no Court in this country which can interfere with the foreign registration, although the mark may be a word which would be refused registration here.

It must be remembered that this country has refused to adhere to those articles of the International Convention which provide that a mark registered in any one of the States shall be entitled to registration in the other countries, and this refusal is based on the fact that the English law declines to recognise as proper for registration many marks which other countries allow to be registered. Yet the Merchandise Marks Act renders it an offence to use on goods in this country a mark which is protected, with or without registration, in any of the States of the Union. That such a provision could have existed on our Statute Book for over thirty years seems extraordinary, the probable reason being that, so far as reported cases show, it has never been acted upon.

It would seem reasonable to require, as a condition of resort to the Criminal Courts, that the mark should be registered in the country where the offence has been committed, and the Committee very properly recommend that the definition of a trade mark in the Merchandise Marks Act should be amended so that proceedings can only be taken under this Act in the case of a registered mark, or in a case where the plaintiff proves by evidence that the mark is in fact understood to mean that the goods bearing it are his. This limitation would apply both to procedure in the Criminal Courts and to action by the Customs Authorities.

Incidentally this amendment will remove one of the worst pieces of drafting on our Statute Book. The definition section of the Merchandise Marks Act says that in that Act the expression "trade mark" shall "mean" a trade mark registered under the 1887 Act and then proceeds to say that it shall "include" unregistered marks if recognised in foreign countries or British possessions within the Convention recognised in foreign countries or British possessions within the Convention.

Definition of False Indications.—The Report recommends an extension of the definition of false indications so as to include forms of misrepresentation in which the indication is not on the goods themselves. It also recommends that an attempt to commit any offence under the Act should in itself be punishable. This would include cases such as soliciting a printer to make forged copies of a trade mark. The Committee are in favour of more vigorous public action for the purpose of detecting and prosecuting offences. They do not, however, favour the establishment of a Government Department for this purpose, but rather that this work should be done by local authorities who have an existing staff.

Procedure.—Another most useful recommendation is that important cases should be dealt with by the High Court rather than by a Police Court. The Police Court is certainly a most unsuitable tribunal to deal with such a dispute as recently occurred in the whisky trade, as to whether the word "whisky" means only a spirit produced by one of two processes, both of which had been largely used for seventy years, or with a case where there is a *bona fide* dispute as to a trade mark. Probably the best procedure would be that either party should have the right to move in the High Court to have the case transferred there.

National Marks.—Another subject dealt with in the Report is that of national marks. These already exist in certain cases, and may be divided into marks which indicate both the place of origin and the quality of the goods, such as the Swedish, Danish, and Dutch butter and bacon marks, and those which generally only indicate the country of origin, such as "UNIS-France," though their use may be prohibited in the case of inferior goods, the sale of which might injure the reputation of the mark. Marks of these kinds also exist in Scotland and Ireland.

The chief point considered by the Committee is the advisability of a British Empire or United Kingdom mark, and the conclusion of the Report is that, although there are powerful arguments for such a mark, the Committee are not prepared to say that the advantages would outweigh the disadvantages. One of the chief objections is that put forward by owners of well-known marks who trade in the Far East and Africa, and who say that any such change in the get-up of their goods as would be necessitated by the use of the new mark would cause confusion in the minds of the natives, whilst the refusal to use the mark might lead to misrepresentations as to the origin of their goods.

Uniformity of Legislation.—The Committee is strongly in favour of attempts being made to obtain greater uniformity in national laws and procedure as to trade marks and trade descriptions. Attention is drawn to the fact that the adherence of a nation to an international convention is no guarantee that it will carry out its obligations thereunder, and that the only remedy that the other parties to the convention have in the case of such failure is that they themselves may withdraw from the

convention. It is therefore suggested that there should be Juridical Departments set up by the League of Nations, which should have power to bring pressure to bear on such defaulting parties.

False Marking.—It is also suggested that, in every case of false marking, the persons aggrieved should have the right to recover damages, and that British representatives should be appointed in foreign countries who could take action in the case of such false marking, either on behalf of the State or on behalf of individuals. International protection of regional appellations, including the names of manufacturing towns, and of national emblems and hall-marks, is also recommended.

Registration Abroad.—Attention is also drawn to the improper registration abroad of British marks, and it is stated that even our hall-marks have been registered by private persons in the United States. The Report recommends the compilation of a list of national emblems and hall-marks which should be protected abroad. Other recommendations include the prohibition of the transfer of a trade mark associated with a British firm to a foreigner without the consent of the Registrar, the international protection of collective marks, and the prevention of local registration of trade marks already in use to the prejudice of the original proprietor.

The Committee are in a position to speak with authority, since not only were commercial interests well and powerfully represented on it, but it also contained experts in trade mark matters in the persons of the Comptroller-General, Mr. Kerly, K.C., and Mr. Evans-Jackson, while Mr. J. Hood, M.P., had the combined qualifications of commerce and law. It is most earnestly hoped that their Report will be followed by early legislation, and that our present ill-drafted and clumsy Merchandise Marks Act will be replaced by a statute embodying its recommendations.

THE FREEDOM OF THE SEAS.[1]

[*Contributed by* G. G. PHILLIMORE, ESQ.]

SIR FRANCIS PIGGOTT has made an historical analysis of the phrase "Freedom of the Seas," illustrated by its application from 1654, when a treaty between England and Portugal adopted the rule, "free ships, free goods," to 1856, when the Declaration of Paris sanctioned it for the leading European Powers. The learned writer has traced its evolution from the Treaty of Utrecht (1713) down to Napoleon's continental system, and his arguments for denying to it international validity may be summarised as follows. The principle practically amounts to an attempt by

[1] *The Freedom of the Seas*, by Sir Francis Piggott, published for the Historical Section of the Foreign Office. (Oxford University Press, 1919, 90 pp.)

a belligerent " out for " world domination to use neutrals as a means of overthrowing the supremacy of its antagonist at sea. Germany in the late war merely imitated the Napoleonic policy. War at sea necessarily diminishes the free use of the sea, directly and indirectly. The principle " free ships, free goods " was an innovation upon the rule established in the thirteenth century by the Consolato del Mare that the property of friends and foes at sea was to be dealt with by a belligerent according to its actual character. By its inclusion in no matter how many treaties between particular nations it, however, does not become a maxim of general international obligation ; and its inclusion in certain treaties between ourselves and other nations was always a concession in return for a definite consideration. The principle itself is not found in any treaty before the Armed Neutrality Conventions in the general form of allowing all neutrals to carry enemy goods free, but only to a limited extent that, as between the two contracting parties, if one was at war with a third State, the other might trade freely with the enemy and carry his goods free. The common statement that the Treaty of Utrecht formally regulated the maritime rights of neutrals and became the common law of nations is incorrect; as there was no single treaty, but three separate treaties made between England and France, England and Spain, and France and Holland, which dealt with trade between neutrals and the enemy, and the first-named was a renewal of the previous arrangement made between England and France at St. Germain-en-Laye in 1677. The effect of the Armed Neutrality Conventions giving extended scope to it is sterilised by the fact that all the signatories afterwards threw it over both as regards their co-signatories and other States. The author has elsewhere stated his belief that the British adhesion to it in the Declaration of Paris was due to a misunderstanding of our actual position under the Treaty of Utrecht (*Nineteenth Century*, August 1918).

Interesting and instructive as this examination of the historical position is, it does not seem to affect seriously the practical grounds on which Lord Clarendon, our Foreign Minister, justified to Parliament our acceptance of the principle, viz. that out of 130 treaties made between the principal Powers of the world in the course of the last two centuries, with eleven exceptions, the rule of " free ships, free goods " is maintained, and his consequent deduction that in " time of war and in the heat and animosity of war, men lay aside the principle and revert to extreme and violent measures; but when at peace, and under the influence of reason and judgment, they never hesitate to declare that that should be the rule of civilised nations." It must, moreover, be remembered that, though treaties between particular States do not establish general principles of international law, yet they are potential " case-law " of this subject which can be cited against a State party to them

even in exceptional circumstances and for definite considerations. Their cumulative effect cannot be ignored in arriving at general international agreement on their subject, and the belligerent of to-day may be the neutral of to-morrow. On the other hand, in every war the interest of the belligerent and the neutral must clash at some point, and it is futile to expect any belligerent to forgo the exercise of rights which his geographical position requires for self-preservation—including attack upon the enemy as well as self-defence—and the late war has shown that circumstances develop new modes of preventing an enemy utilising the neutral to supply him with the necessaries of war. Standing as we do at the close of the greatest war in history, in which, as during the Napoleonic struggle, sea power was the determining factor in victory, we may reasonably hesitate to part with any of the rights which naval supremacy confers. The Declaration of Paris may well be left at its high-water mark of neutral rights, with the exceptions of contraband and blockade, which must receive new interpretation in any war; but Sir Francis Piggott's monograph will have served its purpose if it enables us to understand the historical development of the "Freedom of the Seas" as a doctrine and to realise its limitations for the future as in the past.

The subject of the Freedom of the Seas has also been dealt with (*Clunet*, J. D. I., May–August 1919) by a high French authority, Professor Charles Dupuis of the Free School of Political Science in Paris, from a similar standpoint to that of Sir Francis Piggott, namely, the interest of the belligerent Naval Power. But he considers the principle on its practical merits, without other allusion to its historical evolution than the statement that "the formula which was first enunciated by the Dutch and others and became generally accepted was revived during the war at first as a German and then as an American proposal; but its meaning in the twentieth century is not that in which Grotius used it in the seventeenth, and the German interpretation is entirely different from the American." The rights properly attaching to it in peace time are those of free navigation, fishery, and laying cables on the high seas, and the right of passage through straits connecting two open seas which are essential to main maritime routes. But the German theory extended the principle to include the right of free entry for ships in all ports of the world, and the supply to them of provisions and raw materials on the sale of their industrial products there. In war time the peace time rights must be limited. War at sea has never been confined any more than on land to the struggle between the armed forces of the belligerent. The deciding factor in a State's acknowledgment of defeat is not a military overthrow, but the economic and political disorganisation resulting from the occupation of its territory and the cutting of its communications. At sea only the latter action can produce a similar result to occupation

of territory. Belligerent action preventing the use of the sea by an enemy has always brought on a conflict with neutrals, who have claimed that they ought not to suffer from a struggle to which they were strangers, and that they are entitled to continue their peace-time trade, though this be done with the intention of turning the new state of things to their own advantage and must assist the interest of one belligerent to the prejudice of the other. Consequently, compromises in which the balance swings now in favour of one and now of another, have had to be made in order to reconcile the interests of belligerents and neutrals; belligerents have been restrained by fear of increasing the number of their adversaries and neutrals by fear of being drawn into the conflict. The author illustrates the difficulty arising from conflicting interpretation of existing rules for blockade and contraband by the experience of the late war, which showed that any code, such as the Declaration of London, attempting to formulate permanently the conditions for regulating the neutral relations of belligerents and neutrals is liable to be set aside altogether. The circumstances of each particular war must influence in a greater or less degree the interpretation and application of such rules, which must take account of the geographical situation of the contending parties, the extent and bearing of the quarrel, and the respective forces and feelings of belligerents and neutrals. Germany from the outset refrained from using her fleet, which could not defeat the Allied navies and protect commerce under the German flag. She confined herself to destroying or intimidating trade along the maritime commercial routes by mines or cruisers; and she relied on neutrals to revictual her in provisions and raw materials which she could receive through neutral ports. The Allies' naval policy fluctuated from their initial announcement that they would adhere to the Declaration of London to their gradual supression of it and their making full use of their supremacy at sea without taking account of the neutrals who had made no protest against the German measures in Belgium or their mines laid in the North Sea. Conditional contraband was put on the same footing as absolute contraband; and the German declaration of unrestricted submarine warfare was countered by the blockade of Germany. The success of this new form of blockade has made it a weapon of which its creators are not likely to forgo the use in the future, and the restrictions on the commercial freedom of neutrals imposed by the Allies will probably be the future rules of contraband. The character of *bonâ fide* neutral trade will not be allowed to an extension of the normal peace time trade of a neutral to a regular supply of a neighbouring belligerent, which has been compelled to close its own ports and to use neutral ports as if they were its own. This admirably lucid analysis of the whole position concludes with the proposition that Germany should be punished for her contempt of the principle, of which she

posed as the champion, by being excluded from its benefit, and that she shall not be allowed to fly her commercial flag at sea till she has made restitution for the destruction of shipping, and the individual offenders against international criminal law are brought to trial.

THE THEORY OF MOHAMMEDAN LAW.

[*Contributed by* AHMED SAFWAT, ESQ., *Public Prosecutor, Cairo.*]

MOHAMMEDAN LAW stands at the present day at the same stage in which it was expounded by the four great Imams (jurists), the founders of the four rites, about the middle of the third century of the Hegira (*circa* A.D. 900). The reason why its further development was arrested is partly due to the fact that about that time Mohammedan civilisation reached its zenith—during the reign of the Abbasides—and henceforth Mohammedan society steadily declined; but in a greater measure it is due to the conception of Mohammedan Law as revealing absolute justice, and as such binding on all Mohammedans, for ever.

Modern Codes.—In recent years the Mohammedan States have felt the fettering influence of Mohammedan Law in view of the orthodox theory that the body of Mohammedan Law, as expounded in one or other of the four rites, is obligatory in this sense, that the State cannot by legislation violate any of its accepted rules.

Some of the Mohammedan States, by a bold attempt, separated the domains of civil and criminal law from the rule of Mohammedan Law altogether. Foremost among them was Egypt, when in 1883 it recast its judicial system on the French lines. When the new codes of civil, commercial, criminal, and procedure laws were promulgated it was considered expedient to attach to them a *Fatwa*—a statement by the Grand Mufti to the effect that the new codes are not contradictory to Mohammedan Law. In Turkey, criminal, commercial, and procedure codes were enacted early in the latter half of the nineteenth century, based on the French codes. In both countries Mohammedan Law is still applied to matters of personal statute including inheritance and *wakf* land and, in Turkey, to civil matters as well. The exigencies of modern civil and commercial life, the doctrine of liberty and the studies in criminology have compelled the Mohammedan States to depart from the strict rules of Mohammedan Law and to legislate freely in these spheres.

Personal Law.—In matters of personal status the sacred character attributed to marriage and blood relationship makes a reform—not less needed—more difficult. But when women are educated and freed from seclusion, as is the hope of all enlightened Moslems, they will seek equality with men and will not tolerate the present marital regime, in

which the wife's position is too inferior to that of the husband. A reform in this domain is bound to come in time, and it will be a great problem because the religious character of marriage and family relations is so intimately fused with its legal aspect that the latter is entirely submerged in the former. The legal aspect is taken to be a religious one.

Turkish Law.—In October 1918 the Turkish Government promulgated a temporary new family law (not passed through Parliament) in which subtle innovations not known to Mohammedan Law were introduced. According to it parties to marriage must obtain a licence from the Court with the object of limiting and sometimes prohibiting marriage below a certain age; the marriage contract must be submitted to an official of the Court; the decree of divorce must be communicated thereto. The penalty for failure to carry out these requirements is not, as might be expected, the nullity of the marriage or divorce, but imprisonment. The law allows the wife to stipulate that any second marriage by her husband is null and void, and allows her to seek dissolution of marriage in Court for various reasons. This law—good as it is—was abrogated by the Arabs in Syria, the French in Beyrout, and met with opposition in the Turkish Parliament after the Armistice; but in Palestine it was welcomed by the people and successfully applied by the authorities. Such is the situation in the Mohammedan countries. The problem of the extent to which Mohammedan Law, as expounded in one or other of the four rites, is obligatory on the Mohammedans is of great importance and far-reaching practical value.

The Growth of Mohammedan Law.—It is necessary to trace briefly the history of the growth of Mohammedan Law and to ascertain the value to be attributed to each of its four sources: the Koran, the Tradition (*Hadis*), the unanimous concordance (*Al Ijma'a*), and the analogy (*Al Kyas*). For the sake of brevity, I shall confine the discussion to the main principles, avoiding minute details.

The Koran.—The Koran is the principal source, concise and clear. It is considered as direct revelation of the truth, and as such is binding upon all Moslems.

The Tradition.—The Tradition comprises all that the prophet said or did. That part of it dealing with legal relations forms the second source of Mohammedan Law. The Tradition and the Koran were contemporaneous. A feature common to both—indeed it is general to all legislations—is that they are modelled on the state of society for which they were revealed. The texts of the Tradition bear more or less the character of special solutions, as they were mostly pronounced in connection with special cases, while those of the Koran are more general, assuming the character of fundamental rules, and are limited in number.

Unanimous Concordance.—After the death of the prophet, his successors—the Khalifs—ruled, and decided as best they could any new

cases that arose and were not provided for in the Koran or in the Tradition. No theoretical exposition of the law was attempted before the middle of the second century after the Hegira. During that time judges in Mohammedan dominions of Syria, Northern Africa, and Persia decided all new cases as best they could according to their knowledge of the Koran and the Tradition, using their discretion where the law was silent. Those judges who had seen the prophet and their own contemporaries were considered to have a good knowledge of the Koran and the Tradition. Because they lived with the prophet or with his companions they were deemed to know exactly the meaning of the legal texts and could authoritatively interpret and apply them. The few cases that were decided in that period without dissent are considered as authoritative binding law, and are said to be decided by unanimous concordance. Thus unanimous concordance becomes the third source of Mohammedan Law.

Analogy.—From the beginning of the second century onwards the learned doctors began to compile the Tradition and to explain as well as to interpret the Koran. With the sudden expansion and development of the Mohammedan Empire, the civil and commercial relations, so vast and so complex, revealed numerous *lacunæ* in the law. The Mohammedan jurists set themselves to a careful study of the causes and circumstances of the revelation of each text in the Koran and the Tradition, deducing from them the underlying legal principle which they applied to all similar cases by analogy. Thus analogy was considered the fourth source of the Mohammedan Law.

Naturally this latter method gave rise to endless divergencies of opinion, which are principally divided into four schools of the four Imams, Abu Hunifa, Shafe'e, Malek, and Ibn Hanbal. Each school was again subdivided by divergencies among the disciples of each Imam. Through fear of abuse, it was decided, about the end of the third century, to restrict jurisprudence to the more accepted solutions of any one of these four schools. With this decision all further development of Mohammedan Law was early arrested, and it stands to-day as it was expounded ten centuries ago.

What is the origin of the authoritative character attributed to each source? The Koran, being direct revelation of the absolute truth from God, is binding by itself. By a text of the Koran we are commanded to obey and follow the Tradition, and by the latter we are commanded to abide by the Unanimous Concordance; and it was also agreed to abide by the doctrines of any of the four Imams.

The Theory of Mohammedan Law.—Such is, briefly, the history of Mohammedan Law. It has never been subjected to scientific examination. It is generally held by jurists of the West to be—as all religious systems of law are—an anomalous growth to which the principles of the

science of law do not apply. But, in my opinion, the theory of Mohammedan Law is governed by the fundamental principles of the science of jurisprudence and can be explained accordingly. I believe that its further development was arrested because its expounders conceived it in a different light as revealing absolute justice.

I shall try to explain its nature and the extent of the binding authority of each of the four sources, according to the theories of the general nature of law and of the power of the legislative authority.

The nature of law is expounded in the two complementary theories of Austin and Savigny. The first explains it as the command of the sovereign power, and the second by evolution. Any legislative authority has power to repeal what it, or any inferior authority, has enacted. Let us apply these theories, and see how far the sources of Mohammedan Law may be governed by them.

(1) **Analogy.**—Analogy is not a source of law in the sense that it gives hard-and-fast solutions like those of the Tradition or the Unanimous Concordance; but it is only a method by which new cases unprovided for can be solved in the light of similar cases provided for by deducing the underlying legal principle of the latter and applying it to the former. It is common to all systems of law, and in the last resort it depends on the individual appreciation of the jurists. What elevated this method to the rank of a source of law is the decision adopted in the end of the third century to restrict the judges to the solutions already made in one or other of the four doctrines. Thus the great mass of rulings by analogy became stereotyped for ever; and so analogy, by that decision only, and by no means for any reason inherent in itself, became a source of law providing definite solutions for certain cases.

It is to be remarked that this decision is more in the nature of an administrative order from the sovereign. Without it a Mohammedan judge would find himself free to decide according to his own discretion; but, in fact, after the four great Imams and their disciples no greater jurists have arisen, and the judge will certainly find in one or other of the doctrines a good solution to follow.

(2) **Unanimous Concordance.**—As explained previously, this source gives us few clear decisions on certain cases formulated during the first century of the Hegira. Without discussing either the legality or justice of these decisions, or even the necessity to modify them, I would point out that, in principle, a unanimous concordance at one time may be overruled by an equally unanimous concordance at a later time, on the principle that, as a source of law, Unanimous Concordance is not confined to one period or one certain generation; it exists in all Mohammedan communities, even if only potentially. By a logical illusion it is said that, if the first decision is right and just, the latter would be wrong and unjust; the first cannot be unjust, as the jurists who formulated it

lived with or just after the prophet, and therefore had a closer insight into the Mohammedan Law. Such reasoning is based on the conception of absolute justice, and it is this very conception which has rendered Mohammedan Law immutable. In another sense we can say that those few cases decided by unanimous concordance were either decided by magistrates or by the Khalifat himself. In the former cases they are only precedents, and in the latter they are rules of law that may be repealed by legislation by the sovereign at any later period.

(3) **The Tradition.**—The co-existence of the tradition and the Koran makes the character of the one different from that of the other, as there cannot be two legislative authorities of the same degree at one and the same period. One of them is necessarily inferior to, and limited in authority by, the other. The Koran emanates from the superior authority, and is like an organic law for all Mohammedan States. It conferred on the prophet the exclusive right to interpret it and the right equally conferred on his successors, in their quality of rulers, to legislate in the interests of the people. Besides his power to interpret the Koran and to legislate, the prophet acted more like a magistrate in special cases referred to his decision by litigants than as a lawgiver. These three capacities divide legal tradition into three categories: (1) his legal interpretation of the Koran has the same authority as the Koran; (2) the rules he made in his quality as the ruler can be repealed by his successors. It is important to emphasise this point, and to give an example to illustrate it.

According to the Koran, a husband who marries and divorces the same wife three times cannot marry her a fourth time. Some people used to pronounce the divorce in a triple form at one and the same time. The prophet ruled this to be a single act of divorce, and the husband can remarry his wife. In the time of the second Khalifat, Omar, the habit of pronouncing the divorce in a triple form at one and the same time became so prevalent that, in order to stop it, he decided to give it the effect of a divorce made at three separate intervals, whereby the husband cannot remarry his wife.

(3) His decisions on special cases, by far the greater part of the legal Tradition, have a very great weight, but do not exceed that of his laws.

The Koran.—As an organic law, the Koran contains all the commandments which God wished to impose upon all Moslems for all times and at all places. Therefore the liberty of a Mohammedan is only restricted by the positive commandments of the Koran. I say "positive" to distinguish the positive rules of law from those of morality, which in the Koran are mixed together, and, to distinguish them, we have to look for the nature of the sanction. Where the sanction is the nullity or voidability of the act or the contract, or a penalty to be imposed by the State, the rule is one of law. The sanction for the moral rules of con-

duct is generally punishment in the after-life, and sometimes is a moral incapacity to give evidence in a Court of Law of a notoriously bad person.

The positive rules of law in the Koran fall into three classes :

(*a*) Those that impose an obligation not to do a certain act, *e.g.* not to marry more than four wives at a time.

(*b*) Those that impose an obligation to do a certain act ; *e.g.* the rules of inheritance, the obligation to provide alimony for wife and certain relations.

(*c*) Those that simply declare facultative rights, which the individual may or may not do as he pleases, as the right to marry four wives and the right to divorce.

Of these three classes we are obliged to conform to the first two only, as they are *imposed* by the superior authority (God) and no authority on earth has power to alter them. The facultative rights have no obligatory character. Indeed, they need hardly to have been mentioned, and it is only accidentally in connection with a rule of either the first or the second class that they are mentioned ; *e.g.* the right to marry as many as four wives at a time is mentioned only to declare that it is illegal to marry more than four. In principle everything which is not prohibited is permitted. Therefore it is unnecessary to mention that a certain right is permitted. It is impossible to mention all permitted rights. The fact that certain permitted rights were specially mentioned as such does not change their character or make them differ for any purpose from those of the same class that have not been mentioned.

Legislative Modifications of Mohammedan Law.—In this sphere of permitted rights, the sovereign in any Mohammedan State may legislate freely and restrict or even prohibit certain rights. This right has never been contested except with regard to the permitted rights specially mentioned in the Koran. It is said that, as what is prohibited cannot be permitted, so what is permitted cannot be prohibited. It is an acquired right of the Moslem against the State. There can be no more false and fatal conception. I have shown that permitted rights, whether mentioned accidentally or not mentioned at all in the Koran, are of the same class and character. Therefore, according to the above false conception, a Mohammedan State will be powerless to legislate in any way. All the administrative laws and regulations in a Mohammedan State at the present day, which restrict the liberty of the individual in many ways, would be negations of the acquired rights of the individual Moslem and a grave violation of the organic law, the Koran. Happily no jurist has sustained such an opinion. If the State can restrict any permitted right—mentioned or not—it can in theory restrict them all. In the same way, as it is not permitted to a Mohammedan to exercise certain professions or trades without a licence, he may be prohibited to

marry a second wife without a licence from the Court. In the same way that a Moslem has lost the right to own a slave, he may equally be incapacitated to divorce his wife by his own will. In the same way that a Moslem cannot do certain juridical acts without observing certain solemn formalities, he may be required to observe the same in the contract of marriage.

The Immutable Character of Religious Law.—Therefore the only obligatory part of the Mohammedan Law are those few obligations to do, and not to do, a certain thing imposed by the Koran, and that is because they are imposed by a superior authority that speaks no more, and may only be changed by the same authority in a new revelation, if any will come. The only difficulty in the way of my theory is that certain institutions like marriage and *wakf* laws are considered to be of a religious character. But why should there be difference in the sanctity of one legal institution as compared with another ? Mohammedan Law, as a whole, is either law pure and simple or is of religious character in all its institutions. If the whole body of law is religious, and cannot be changed, we meet the difficulty that its criminal law and procedure law are incompatible with the present state of society, and have been changed in all advanced Mohammedan States. If it is purely legal, there would be no reason why family and *wakf* laws should not be changed. In Turkey inheritance to *Miri* land (the bare ownership of which is vested in the State) is different to the rules of inheritance in Mohammedan Law. The girl shares equally with her brother the *Miri* land of their deceased father, and takes only half his share in all other rights.

Customary Law.—It is a recognised principle in Mohammedan Law that local custom should be respected, and that the decisions of the Courts may vary according to the exigencies of locality and society. The application of this principle must not—as is the case—be restricted to individual cases, but logically can and should be extended to any institution as a whole, as to *wakf* and the marriage institution.

Conclusion.—In the light of this exposition Mohammedan Law does not stand outside the science of law, and is governed by its fundamental principles. Its development was arrested at an early age because its nature was conceived in a different way, as revealing absolute justice. The Mohammedan jurists had no knowledge of other systems of laws, and conceived the law in an abstract way, such as was the conception of the " law of nature."

But conceived in this way it can be taken to be the common law for all Mohammedan countries and the State can legislate freely provided that it does not violate any of the positive obligations imposed in the Koran.

WILLS OF LUNATICS.

[*Contributed by* W. G. H. Cook, Esq., LL.D.]

The Power of Testamentary Disposition.—In all civilised countries the law concedes to every person the right of determining, by his last will, to whom the property which he leaves behind him shall pass. Nevertheless, although the law leaves to a person absolute freedom in the disposition of his property, it has been rightly observed that "a moral responsibility of no ordinary importance attaches to the exercise of the right thus given." [1] The instincts and affections of mankind, in the majority of instances, will lead men to make provision for those who are the nearest to them in kindred, and for those who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relations the property which he possessed. The same motives will influence him in the exercise of the right of disposal when secured to him by law. Hence arises a reasonable and well-warranted expectation on the part of those of a man's kindred who survive him that, upon his death, his property shall become theirs instead of being given to strangers. To disappoint the expectation thus created, and to disregard the claims of relatives is to shock the common sentiments of mankind, and to violate what all men concur in regarding as a moral obligation. It cannot be supposed that, in giving the power of testamentary disposition, the law has been framed without regard to these considerations. On the contrary, if they had stood alone, it is probable that the power of testamentary disposition would have been withheld altogether, and that the distribution of property after the owner's death would have been uniformly regulated by the law itself. There are, however, other considerations which turn the scale in favour of the testamentary power. Among those who, as a man's nearest relatives, would be entitled to share the property which he leaves behind him, some may be better provided for than others; some may be more deserving than others; while some, either through age, or sex, or physical or mental infirmity, may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have claims which ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; and age secures the respect and attentions which are one of its chief consolations. For these reasons the power of disposing of property in anticipation of death has always been regarded as one of the most valuable of the rights incidental to the ownership of property; while there can be no doubt that it operates as a useful incentive to

[1] *Banks* v. *Goodfellow*, L.R., 5 Q.B. 549.

industry in the acquisition of wealth and to thrift and frugality in the enjoyment of it.

The Right to dispose of Property.—The law of every civilised country has, therefore, conceded to the owner of property the right of disposing by will of either the whole, or, at all events, of a portion, of that which he possesses. The Roman law, and the law of those European nations which have followed it, have secured to the relations of a deceased person in the ascending and descending line a fixed portion of the inheritance. The English law, on the other hand, leaves everything to the unfettered discretion of the testator, on the assumption that, although, in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims which ought to be regarded, yet the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law. The absolute and uncontrolled power of testamentary disposition conceded by the law is founded upon the assumption that a rational will is a better disposition of a man's property than any which can be made by the law itself.

Testamentary Capacity.—As a logical complement to the unfettered discretion allowed to a testator in the disposal of his property after his death, the English law insists, as an indispensable condition, upon the possession by the testator of the intellectual and moral faculties which are commonly enjoyed by mankind. In determining whether or not a testator, at the time of making his will, was possessed of testamentary capacity, the Court is influenced by the following considerations. There must be, on the part of the testator, (1) a sound mind as well as a memory which is able to recall the several persons who may be fitting objects of the testator's bounty, and (2) an understanding to comprehend the relationship of the beneficiaries to himself and their respective claims upon him. By the expression "sound mind" the law does not mean a perfectly balanced mind, because, if this were so, no one would be competent to make a will. The law does not say that a man is incapacitated for making a will if he propose to make a disposition of his property while under the influence of capricious, frivolous, mean, or even wrongful, motives. According to the law of England (which differs in this respect from the law of many other countries), everyone is left free to choose the person upon whom he will bestow his property after death; he is entirely unfettered in the selection he may think proper to make. In order to gratify his spite, he may disinherit his children, either wholly or partially, and leave his property to strangers, or he may leave it to charities in order to gratify his pride. The business of the Courts, in any case which comes

before them, is to give effect to the expression of the true mind of the testator, and this involves a consideration of what is the amount and quality of intellect which is requisite in order to constitute testamentary capacity. In recent cases, the Courts have admitted, with some degree of freedom, the evidence of lunacy experts.

The strict legal view was expressed by Sir J. Hannen when delivering judgment in *Boughton* v. *Knight* where he said:

> The question of testamentary capacity is eminently a practical one, in which the good sense of men of the world is called into action, and it is one which does not depend solely on scientific or legal definition.[1]

Degrees of Mental Capacity.—The difficulty of laying down any legal rules as to testamentary capacity was appreciated by Lord Cranworth, who in *Boyse* v. *Rossborough*[2] used the following words:

> On the first head the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or a drivelling idiot in saying that he is not a person capable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine.

Hence, in considering this important question of degree, the law makes considerable allowance for the difference of individual character: it disregards eccentricities of manner, of habits of life, of amusements, of dress and so on. The law is not satisfied to apply the layman's test of whether or not the testator is very different from other men, but it applies the general test: was the testator, *at the time of making the will*, labouring under delusion? Sir J. Nicholl, in *Dew* v. *Clark and Clark*,[3] says that a person is under a delusion when he once conceives something extravagant to exist which has still no existence whatever but in his own heated imagination, and whenever, at the same time, having so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception.

Natural Affection.—On the assumption that a man would naturally dispose of his property by will for the benefit of his children, unless there existed good reason for his doing otherwise, the law has always been willing to investigate the suggestion of a testator's insanity made by children or other near relatives who have been disinherited for no apparent reason. *Dew* v. *Clark and Clark* affords a good illustration of this point. In that case the testator took a long, persistent dislike of his only child,

[1] L.R. 3 P. & D. at p. 67. [2] 6 H.L.C. at p. 45. [3] 3 Add. Eccl. 79.

a daughter, who, upon the testimony of all who knew her, was worthy of all love and admiration, for whom the father entertained, so far as his nature would allow, the warmest affection; but his affection took an extraordinary form he desired that his child's mind should be subjected entirely to his, and that (among other things) she should confess her faults to him; and, because the child did not fulfil his desires and hopes in that respect, he treated her as a reprobate and an outcast. In her youth he treated her with great cruelty. He beat her, he used unaccustomed forms of punishment, and he continued throughout his life to treat her as if she were the worst, instead of apparently one of the best, of women. In the end, he left her with so small a legacy, that she was virtually disinherited. The testator, who was a medical practitioner, was a man who, throughout life, had presented to those who met him in the ordinary course of business and of social life the appearance of a rational man. Yet, upon the ground that his conduct towards his daughter could be explained only by the existence of insanity, the will was set aside and the property distributed as upon an intestacy.

The Measure of Mental Power.—It is essential to the exercise of the power of making a will that the testator shall be suffering from no disorder of the mind to poison the affection, to pervert his sense of right or to prevent the exercise of his natural faculties, and that no insane delusion shall influence his mind in disposing of his property in such a way in which, if the mind had been sound, would not have been done. This is the measure of the degree of mental power upon which the law insists. If, however, the human instincts and affections, or the moral sense, become perverted by mental disease, if insane suspicion or aversion take the place of natural affection, if reason and judgment be lost, and the mind become a prey to insane delusions calculated to interfere with, and to disturb its functions, and to lead to a testamentary disposition due only to their baneful influence, in such a case the condition of testamentary power fails, and a will made in such circumstances will not be allowed to stand.

Thus, in a probate action where the sanity of a testator is in question, the issue is whether or not the testator was of a sound and disposing mind: in other words, the fact to be determined is whether or not the testator was able at the time of making his will to understand the nature of the act and its effect, the extent of the property of which he was disposing, and the claims to which he ought to give effect.[1]

It may be observed that the will of an idiot is void; so also is that of a deaf mute (who in presumption of law is an idiot)[2]; but this latter presumption may be rebutted by evidence that, though deaf and dumb, the testator was of sound mind and of testamentary capacity.[3]

[1] *Banks* v. *Goodfellow, supra.*

[2] *In the Goods of Owston*, 2 Sw. & Tr. 461.

[3] *Dickenson* v. *Blisset*, 1 Dick. 268.

According to Swinburne, the general rule is that the will of a lunatic made during his insanity is void[1]; thus, where a person of unsound mind purported to make a will, letters of administration were granted as if he had died intestate.[2] But, in this absolute form, it will be seen that Swinburne's statement is not an exact account of the law upon this important matter. It was held, however, in a recent case that the will of a lunatic, whether he be so found or not, made during a lucid interval is valid.[3]

But a will executed during insanity does not become valid upon the subsequent recovery of the testator. However much he may wish his will to stand, the testator cannot ratify it upon recovering his sanity: he must execute another will in which he should, for safety's sake, revoke all previous wills.[4] A holograph will affirmed and delivered by a testator affords strong evidence of his capacity to make a will.[5] Although the evidence of an attesting witness impeaching the validity of the will is admissible, it must be received with great caution, inasmuch as he thus impeaches his own act[6]; corroboration by other evidence is necessary before weight can be attached to such evidence.[7]

On the same principle upon which the law requires strong evidence of full capacity on the part of the testator where there exists between him and the beneficiary under the will certain intimate or confidential relations (*e.g.* medical man and patient; parent and child; guardian and ward; spiritual adviser and penitent; legal adviser and client); even stronger proof of testamentary capacity is required where there appears to the Court to exist in the testator some mental weakness which, although not amounting to incapacity, renders him liable to be unduly influenced by those around him.[8]

Before proceeding to consider the difficult question of partial insanity, it should be stated that, in the opinion of an eminent judge (Sir J. Hannen)—

> The highest degree of mental soundness, if degrees there be, is required by the law in order to constitute capacity to make a testamentary disposition, because, from the nature of the act, it requires the consideration of a larger variety of circumstances than is required in other acts, *e.g.* in contracts of buying and selling and in marriage, for it involves reflection upon the claims of several persons, who, by nature, or through other circumstances, may be supposed to have claims on the testator's bounty, and it involves also the

[1] *Swinburne on Wills*, Part II, s. 3.
[2] *In the Goods of Rich* [1892], p. 143.
[3] *In re Walker* [1905], 1 Ch 160.
[4] *Arthur* v. *Bokenham*, 11 Mod. Rep. 148.
[5] *Cartwright* v. *Cartwright*, 1 Phillim. 90.
[6] *Bootle* v. *Blundell*, 19 Ves. 494.
[7] *Kinleside* v. *Harrison*, 2 Phillim. 449.
[8] *Mountain* v. *Bennet*, 1 Cox. Eq. Cas. 353.

power of considering these several claims and of determining in what proportion the property shall be divided among the claimants.[1]

This dictum is representative of the old doctrine of the oneness and indivisibility of the mind which is considered below.

It is interesting and instructive at this stage to consider the rules relating to testamentary capacity obtaining in other systems of law.

Roman Law.—In the *Roman law* the madman (*furiosus*) and the person of defective intelligence (*mente captus*) are declared incapable of making a testament; but the authorities are silent as to what constitutes madness or defectiveness of intelligence sufficient to prevent the exercise of the testamentary right.

Continental Codes.—The continental codes are equally general in their terms, providing merely, either that persons must be of sound mind to make a will, or that persons of unsound mind shall be disabled from doing so. It seems, moreover, that the older jurists appear not to have been alive to the distinction between partial and total unsoundness of mind as affecting testamentary capacity; more recently, however, the question has been mooted by several eminent and distinguished jurists, but with a marked discordance of opinion.

French Law.—Troplong, in a section of *Le Droit Civil Expliqué* entitled "Commentaire sur les donations entre vifs et testaments"; and Lacase, in a treatise entitled, *La Folie considérée dans ses rapports avec la Capacité Civile* have both adopted the doctrine of the unity and indivisibility of the mind, and the consequent unsoundness of the whole mind if insane delusions anywhere exist. On the other hand, equally distinguished writers have maintained the contrary view. Thus Legrand du Saulle, in a very able work entitled, *La Folie devant les tribunaux* contends that—

> Hallucinations are not a sufficient obstacle to the power of making a will if they have exercised no influence on the conduct of the testator, have not altered his natural affections, or prevented the fulfilment of his social and domestic duties; while, on the other hand, the will of a person affected by insane delusion ought not to be admitted if he have disinherited his family without cause or looked upon his relations as enemies, or accused them of seeking to poison him, or the like. In all such cases, where the delusion exercises a fatal influence on the acts of the person affected, the condition of the testamentary power fails; the will of the party is no longer under the guidance of reason, it becomes the creature of the insane delusion.

Three other jurists of eminence, viz. Demolombe in *Cours de Code Napoléon*, Castlenau in his treatise *Sur l'Interdiction des Aliénés*, and Hoffbauer in his work on *Medical Jurisprudence relating to Insanity*,

[1] L.R. 3 P. & D. at p. 68.

have maintained the doctrine that monomania, or partial insanity not affecting the testamentary disposition, does not take away the testamentary capacity.

Italian Law.—Mazzoni, in his work entitled, *Instituzione di diritto Civile Italiano,* lays it down that "monomania is not an unsoundness of mind which absolutely and necessarily takes away testamentary capacity, as the monomaniac may have the perfect exercise of his faculties in respect of all subjects beyond the sphere of the partial derangement."

Partial Insanity.—In the opinion of many legal and forensic-medical authorities, the power of testamentary disposition should not be abrogated, in spite of the existence of mental disease, unless the insanity be general or of such a nature that it manifestly incapacitates the testator for making a rational will. In other words, modern science has shed so much light upon the true nature of insanity that the old doctrine of the oneness and indivisibility of the mind is no longer regarded by pathological-psychologists as satisfactory where any question has been raised as to the capacity of the testator.

The modern view of the effect of insanity upon testamentary disposition is that partial unsoundness of mind, not affecting the general faculties, and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will. Thus, at a trial as to the validity of a will in favour of the testator's niece, it appeared that the testator made the will in 1863; that he had been under treatment as a lunatic for some months in 1841; and that he remained subject to delusions that he was personally molested by a man who had long been dead, and that he was pursued by evil spirits whom he believed to be visibly present. These delusions were shown to have existed between 1841 and the date of the will, and also between that date and his death in 1865. The evidence as to the testator's general capacity to manage his affairs was contradictory, but it was admitted that at times he was quite capable of making a will. The Court of Appeal held that the judge was right in directing the jury to consider whether, at the time of making the will, the testator was capable of having such knowledge and appreciation of facts, and was free from delusions to such an extent as would enable him to have a will of his own in the disposition of his property, and to act upon it; further, that the mere fact of the testator's being able to recollect things or to converse rationally on some subjects, or to manage some business, would not be sufficient to show that he was sane; while, on the other hand, slowness, feebleness, and eccentricities would not be sufficient to show that he was insane.[1]

The question as to how far the existence of mental delusions upon a particular matter affects testamentary capacity was considered also in

[1] *Banks* v. *Goodfellow, supra.*

Boughton v. *Knight*,[1] where it was held that a man moved by capricious, frivolous, mean, or even bad motives may disinherit his children and leave his property to strangers; that he may take an unduly harsh view of the character and conduct of his children; but the law places a limit beyond which such action will cease to be regarded as a question merely of harsh, unreasonable judgment, and beyond which limit the repulsion which a parent exhibits to his own child will be assumed to proceed from some mental defect.

In this connection an English authority on lunacy says:

> It is well known to those who are conversant with the insane, that in persons who are considered as labouring under monomania, the mind is otherwise disordered and weakened, though the characteristic illusion is the most striking phenomenon. The social affections are either obliterated or perverted: some ruling passion seems to have entire possession of the mind, and the hallucination is in harmony with it, and seems to have had its origin in the intense excitement of the predominant feeling; there is always a selfish desire or apprehension, and the illusory ideas relate to the personal state and circumstances of the individual. In most cases of exclusive or partial mental illusion, the persons afflicted are abstracted, absent, incapable of applying themselves to any occupation, or even of reading with attention; they either forget the objects of their strongest attachment, or, if they think of them at all, it is only to accuse them of injustice and cruelty on the most frivolous pretexts, or the most improbable suspicions.[2]

Modern English Decisions.—From an examination of the English law reports, there appears to be no doubt that an ordinary lunatic who is deficient in his general faculties does not possess testamentary capacity; but the question whether partial unsoundness of mind not affecting the general faculties, and not operating upon the mind of a testator in regard to the particular testamentary disposition in question, is sufficient to deprive a person of the power of disposing of his property presented itself for judicial decision for the first time in the case of *Banks* v. *Goodfellow*, where the Court repudiated the old doctrine of the oneness and indivisibility of the mind which was enunciated in *Waring* v. *Waring*,[3] and followed in *Smith* v. *Tebbitt*,[4] viz. that *any* degree of mental unsoundness must be held fatal to the capacity of a testator. In the latter case it was held that, if disease be shown once to have existed in the mind of a testator, notwithstanding that it is discoverable only when the mind is addressed to a certain subject to the exclusion of all others or that the subject on which it is manifested has no connection whatever with the testamentary disposition before the Court, the testator

[1] *Supra.*

[2] Dr. J. C. Prichard in *Insanity in Relation to Jurisprudence*, s. vii. p. 69.

[3] 6 Moo. P.C. 341.

[4] 1 P. & D. 398.

must be pronounced incapable. It was decided also that a diseased state of mind, once proved to have established itself, will be presumed to continue, and that the *onus* of showing that health has been restored falls upon those who assert it. It appears from the judgment of Sir J. P. Wilde that the question of insanity is a mixed one, partly within the range of common observation, and partly within the range of special medical experience, and it is the duty of the Court, in searching for a conclusion, to inform itself of the general results of medical observation, and to make a comparison between the sayings and doings of the testator at the time when the disease is alleged to exist; and, first, his sayings and doings at a time when he was sane, or the sayings and doings of those sane persons whose general temperament and character bear the closest resemblance to his own; and, secondly, the sayings and doings of insane persons. The argument used was as follows. The law of England permits a large exercise of volition in the disposal of property after death, but it requires, as a condition, that this volition should be that of a mind of natural capacity, not unduly impaired by old age, enfeebled by illness, or tainted by morbid influence. Such a mind is known to the law as a "sound and disposing mind." Consequently, it was argued, if the mind be disordered in any one faculty, if it labour under any delusion arising from such disorder, though its other faculties and functions remain undisturbed, it cannot be said to be sound, such a mind is consequently unsound, and testamentary incapacity is the inevitable result.

It is clear that in *Waring* v. *Waring* and in *Smith* v. *Tebbitt* it was held that, in order to constitute testamentary capacity, complete soundness of mind is indispensably necessary; that the mind, though it has various faculties, is one and indivisible; that if it be disordered in any one of these faculties, if it labour under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound; and that such a mind is unsound and testamentary incapacity is the necessary consequence.

Chief Justice Cockburn, in dissenting (in *Banks* v. *Goodfellow*) from the doctrine enunciated in *Waring* v. *Waring* expressed himself in these words:

> The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances, one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed; that, while the mind may be overpowered by delusions which utterly demoralise it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions which, though the offspring of mental disease, and so

far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. . . . We readily concede that where a delusion has had, as in the case of *Dew* v. *Clark and Clark*, or is calculated to have had, an influence on the testamentary disposition it must be held to be fatal to its validity. . . . The question is, whether a delusion, thus wholly innocuous in its results as regards the disposition of the will, is to be held to have the effect of destroying the capacity to make one. . . . It is said, indeed, by those who insist that any degree of unsoundness should suffice to take away the testamentary capacity, that where insane delusion has shown itself, it is always possible, and indeed may be assumed to be probable, that a greater degree of mental unsoundness exists than has actually become manifest. But this view, which is by no means universally admitted, is unsupported by proof, and must be looked upon as matter of speculative opinion. It seems unreasonable to deny testamentary capacity on the speculative possibility of unsoundness which has failed to display itself, and which, if existing in a latent and undiscovered form, would be little likely to have any influence on the disposition of the will. . . . Where in the result the jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made in such circumstances should not be upheld. . . . In the case before us two delusions disturbed the mind of the testator, one that he was pursued by spirits, the other that a man long since dead came personally to molest him. Neither of these delusions had, or could have had, any influence upon him in disposing of his property. The will, though in one sense an idle one, inasmuch as the object of his bounty was his heir-at-law, and, therefore, would have taken the property without its being devised to her, was yet rational in this, that it was made in favour of a niece who lived with him and who was the object of his affection and regard. Under these circumstances we see no ground for holding the will to be invalid.

It would seem, therefore, that in repudiating, in *Banks* v. *Goodfellow*, the doctrine of the oneness and indivisibility of the mind, Chief Justice Cockburn was justified in saying that the doctrine embraced in the judgments in *Waring* v. *Waring*[1] and in *Smith* v. *Tebbitt*[2] was wholly unnecessary to the decision, and that it was not "concluded by authority," inasmuch as in both cases the insanity was general, *i.e.* not partial, the delusions being multifarious and of the wildest and most irrational character, indicating clearly that the mind of the testator was diseased throughout.

In *Jenkins* v. *Morris*[3] it was laid down, in unmistakable language, that, as a general principle, the rule is that the delusion from which a testator may have been suffering at the date of the execution of the will need not be held fatal even if not wholly unconnected with the subject matter of the testamentary disposition.

[1] *Supra.* [2] *Supra.* [3] 14 Ch. D. 674.

The decision in *Banks* v. *Goodfellow* has been followed by the later and, to some extent, complementary case of *Smee* v. *Smee*,[1] where it was held that a man may be capable of transacting business of a complicated and important nature involving the exercise of considerable powers of intellect, and yet be subject to delusions so as to make him unfit to make a will; and that, on the other hand, if the delusions under which a man labours be such that they could not reasonably be supposed to have affected the dispositions made by his will, it would be valid.

An important case on partial insanity was heard by the House of Lords on November 17, 1919, when it was held that, although the testator was admittedly insane, inasmuch as he was at the date of the execution of the will then suffering, not from general insanity, but from an intermittent delusion which did not prevent him from dealing with his property in a rational manner, he was not incapacitated from making a will merely because he was insane. Lord Haldane, in delivering judgment, said that a testator must be able to exercise a rational apprehension of what he was doing, and that he must understand the nature of the act. Whether there was such unsoundness of mind as rendered it impossible in law to make a testamentary disposition was a question of degree. The decision in *Jenkins* v. *Morris*[2] was referred to with approval.[3]

In conclusion, it would appear that, from the leading cases considered, the law of England to-day admits of the rule that any form of insanity does not *per se* deprive a man of testamentary capacity; further, that upon the production of sufficient evidence that the nature of the insanity is not such that the testator is incapable of *any* juristic act whatever, and that, on the contrary, the testator either made the will during a lucid interval or was able, in spite of his partial insanity, to understand fully the nature of his act, a will made by such a person of unsound mind shall not be impeached merely on the ground of the partial insanity of the testator.

In other words, in the eye of the law a person suffering from delusions may, in certain circumstances, be capable of making a valid will. Each case has, however, to be dealt with upon its own merits, and the Courts have not attempted to lay down any general rule to be followed in all cases of so-called partial unsoundness of mind.

Mental Capacity below Normal.—Testamentary incapacity may arise from causes other than but analogous to actual lunacy, viz. from want of intelligence occasioned by defective organisation, or by supervening physical infirmity, or by the decay caused by advancing age, as distinguished from mental derangement. In these cases, although the mental capacity may be reduced below the normal standard, power to make a will is not abrogated if the mental faculties retain sufficient strength fully

[1] 5 P.D. 84. [2] 14 Ch. D. 674.

[3] *Sivewright* v. *Sivewright*, *The Times* newspaper, Nov. 18, 1919.

to comprehend the testamentary act about to be done. Thus, Voet in his *Commentary on the Pandects* says: "Non sani tantum sed et in agone mortis positi, seminece ac balbutiente lingua voluntatum promentes, recte testamenta condunt si modo mente adhuc valeant." [1]

This important aspect of testamentary capacity was fully considered by the Judicial Committee of the Privy Council in the case of *Harwood* v. *Baker*,[2] where it was laid down that the standard of capacity in cases of this sort is the capacity on the part of the testator to comprehend the extent of the property to be disposed of, and the nature of the claims of those whom he may be including in his will.

NOTES ON POINTS OF IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH.]

Extraterritorial Legislation.—In *R.* v. *Lander* [3] the Court of Appeal of New Zealand was called upon to decide definitely an issue, which has several times been discussed in this *Journal*,[4] and which turns on the power of Dominion Legislatures to pass enactments dealing with offences committed beyond the territorial limits of the Dominions. The accused in this case was a British subject, born and domiciled in New Zealand, who had married there, and, while serving as a member of the New Zealand Expeditionary Force, had gone through a form of marriage with another woman in England. His case clearly fell within the terms of s. 224 of the *Crimes Act*, 1908, defining bigamy in the case of a British subject as "the act of a person who, being married, goes through a form of marriage with any other person in any part of the world." But the decision of the Privy Council in *McLeod* v. *Attorney-General for New South Wales* [5] obviously suggested that the section in question was *ultra vires*, and the point was reserved for decision by the Court of Appeal. The Chief Justice eloquently supported the validity of the law on the broad ground that New Zealand must have authority to legislate for New Zealand citizens or subjects, even beyond territorial limits, under its power to pass laws for the peace, order, and good government of the Dominion; and he suggested further that it was doubtful if the Courts of New Zealand had any right to declare *ultra vires* a New Zealand law, unless it was repugnant to an Imperial Act, or dealt with a matter not within the scope of the peace, order, and good government of the Dominion. He also treated *McLeod's case* as in effect inconsistent with

[1] Lib. 28, tit. 1, S. 36.
[2] 3 Moo. P.C. 282.
[3] [1919] N.Z.L.R. 305.
[4] IX. 207; 3rd series, i. 9, 10.
[5] [1891] A.C. 455.

the subsequent case of *Attorney-General for Canada* v. *Cain*.[1] But the Chief Justice's contentions and those of the Solicitor-General were deliberately rejected by the majority of the Court (Edwards, Chapman, Sim, and Hoskins, JJ.). It was pointed out that *Cain's case* rested on a wholly different basis, and that it justified merely such degree of extra-territorial constraint as was necessary to render effective the indubitable right of Canada to expel aliens from her territory, implicitly, indeed, affirming the existence of the rule laid down in *McLeod's case*. With this decision accords the resolution of Canada to obtain from the Imperial Parliament the necessary authority to pass laws with extraterritorial operation in spite of the suggestion, often made in the Dominion, that Canada already possesses this power.

The decision in Lander's case raised a curious point; in *R.* v. *Jackson*[2] the Chief Justice held that the definition of bigamy in the *Crimes Act* was completely invalid, and quashed an indictment for bigamy committed in New Zealand. This decision was reversed by the Court of Appeal, on the ground that the invalid portion of the definition, the words "in any part of the world," was severable from the remainder, or the words could by s. 5 of the *Acts Interpretation Act*, 1908, be construed distributively as a reference to each country, including New Zealand.

Effect of Dominion Naturalisation.—In *Markwald* v. *Attorney-General* the Court of Appeal has given, it may be hoped, the *coup de grâce* to a claim which has troubled the Courts for years, since the appellant, who was naturalised in the Commonwealth under the *Naturalisation Act*, 1903, was proceeded against for failure to register himself as an alien under the *Aliens Restriction Act*, 1914 (4 & 5 Geo. V., c. 12), and convicted by the magistrate. The conviction was upheld in *R.* v. *Francis, ex parte Markwald*,[3] and this was followed by an action against the Attorney-General for a declaration that the plaintiff was no alien in England, but a liege subject of His Majesty throughout the British Dominions. The contention was plainly contrary to the terms of the British and Commonwealth *Naturalisation Acts*, and the plaintiff had accordingly to rely on the contention that the oath of allegiance, required of him in the Commonwealth on naturalisation, converted him into a British subject throughout the Empire, on the analogy of *Calvin's case*.[4] The argument was ingenious, but unconvincing; in *Calvin's case* naturalisation was not in question, but the status of natural-born subjects, and the acceptance of the contention would have upset the whole basis on which local naturalisation was founded. The way for true imperial naturalisation is, of course, provided in Part II. of the *British Nationality and Status of Aliens Act*, 1914, but the reluctance of some of the Dominions to follow it is sufficiently notorious.

[1] [1906] A.C. 542.
[2] [1919] N.Z.L.R. 607.
[3] [1918] 1 K.B. 617.
[4] 7 Co. Rep., 1*a*.

Constituent Powers of State Parliaments.—The extremely wide powers of constitutional alteration possessed by the State Parliaments in Australia are effectively illustrated in *McCawley* v. *The King*, in which the Judicial Committee reversed a majority decision of the High Court of the Commonwealth, which had affirmed a judgment of the Full Court of Queensland. The *Industrial Arbitration Act*, 1916, of Queensland, provided for the creation of a Court of Industrial Arbitration, and proceeded by s. 6 (6) to authorise the Governor-in-Council, notwithstanding the provisions of any Act limiting the number of judges of the Supreme Court, to appoint the President or any judge of the Industrial Court to be a judge of the Supreme Court. If so appointed, the President or other judge of the Industrial Court was to hold office as a judge of the Supreme Court during good behaviour. It was further provided that the tenure of office of the President and judges of the Industrial Court was to be for seven years, with eligibility for reappointment for a like period. Mr. McCawley was appointed President of the Industrial Court, and subsequently given a commission as judge of the Supreme Court. Exception was taken to his acting in this capacity, and the matter was brought to a formal issue on an information of *quo warranto* calling upon him to show by what authority he claimed to be a judge of the Supreme Court.

The motive of the objection was, of course, simple, being based on the view that judges of the Supreme Court should be freed from suspicion of dependence on the executive by being appointed for life, subject to good behaviour, a condition violated by the appointment of a judge whose tenure of office was but for seven years, and who might be unduly subject to executive pressure, owing to his reliance on the Governor-in-Council for a renewal of his appointment. Valid, however, as were the objections taken to the act on grounds of principle, the only legal contention which could be adduced was that the act infringed the constitutional rule as enacted in the Queensland Act of 1867 regarding the constitution of the colony; and that, though the Queensland Parliament could amend the constitution, it must do so by means of the twofold procedure of (*a*) a repealing Act, and (*b*) a separate and independent Act to make the change effective. This plainly went far beyond the possibilities of successful argument; it might effectively have been contended, in accordance with the principle laid down in *Cooper* v. *Commissioners of Income Tax*,[1] that the constitution could not be altered merely incidentally or inferentially, or, put in another way, that Acts not clearly dealing with constitutional matters should be interpreted so as to be consistent with the constitution. But in this case the intention of the Act of 1916 to alter the constitution was plain, and the Judicial Committee had no difficulty in asserting its validity, in accordance with s. 5 of the *Colonial Laws Validity Act*, 1865.

[1] 4 C.L.R. 1304; cf. *Responsible Government in the Dominions*, pp. 426, 427.

The effect of this judgment, however, must not be exaggerated. The constituent powers of the State Parliaments are not as great as those of the Imperial Parliament, even within their peculiar sphere of action. The Imperial Parliament, for instance, cannot enact that some constitutional measure passed by it can be altered only by a two-thirds majority, so as to bind any succeeding Parliament; such an enactment by a State Parliament would be valid and binding on any subsequent Parliament, for the *Colonial Laws Validity Act* grants constituent powers subject to the express proviso that the laws passed must have been enacted in such manner and form as may from time to time be required by either imperial or colonial legislation. Moreover, it must be remembered that until 1907 the constituent powers of State Parliaments were hampered by elaborate restrictions, intended to secure that no change of consequence could be made without the deliberate approval of the British Government, and that even now certain classes of Constitution Acts must be reserved by the Governor.

South African Appeals.—S. 106 of the South Africa Act, 1909, provides that "there shall be no appeal from the Supreme Court of South Africa or from any division thereof to the King in Council, but nothing herein contained shall be construed to impair any right which the King in Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King in Council. Parliament may make laws limiting the matters in respect of which such special leave may be asked, but bills containing any such limitation shall be reserved by the Governor-General." The effect of this section is now definitively laid down by the Judicial Committee in *Whittaker* v. *The Mayor and Councillors of the Borough of Durban*,[1] and their view coincides with that which has repeatedly been expressed by Union statesmen,[2] that the appeal from South Africa has disappeared save as a possibility in some case of paramount difficulty and importance. The point at issue in the case in question was one of some difficulty and importance, the power of the Lieutenant-Governor of Natal in 1854 to define and to alter the boundaries of Durban, and it was conceded that there might be involved a real constitutional issue of the type suitable for decision by the Committee. But the matter was essentially a local one, and the intention of the Union Act was that South Africa was to dispose of its own appeals, subject to the bare preservation of the prerogative right for use in some great case, for the power of the Union Parliament to limit the cases in which leave could be asked for implied that the grant of leave should be restricted.

The Committee distinguished their decision in this case from the practice in the case of Canadian appeals by referring to the fact that

[1] *The Times*, July 9, 1920.

[2] See e.g. *Parl. Pap.*, Cd. 5745, pp. 231, 232, 245.

the terms of the Canadian Act[1] do not affect the discretion to grant leave. The problem, however, remains why Commonwealth Appeals are treated differently from South African Appeals, for s. 106 of the South Africa Act is based upon s. 74 of the Commonwealth constitution, and their Lordships, though reluctant to hear appeals save on important issues from the Commonwealth, have not carried their abstention to the extent now manifested in the case of South Africa. Nor is the ground of distinction between the two instances due to the federal character of the Commonwealth constitution, for appeals on federal issues cannot come to the Committee by the grant of leave to appeal. It can hardly, however, be doubted that the rule now laid down for South Africa must be given general application, and that appeals from the Dominions must soon altogether cease, unless—as is very improbable—some progress is made with Mr. Hughes's revival of Mr. Joseph Chamberlain's proposal for a single Imperial Court of Appeal.

INTERNATIONAL BAR ASSOCIATION.

THE East is certainly awakening, and moving very fast. Last year some Philippine lawyers, feeling the need of an Association which should bring together the jurists of the East, held a conference at Manilla, at which the inauguration of such a body was decided upon. Subsequently it was decided, largely under the inspiration of the veteran Anglo-Japanese lawyer, Dr. R. Masujima, to make the new Association a world-wide one, under the name of The International Bar Association, and its statutes were framed and accepted at a large and enthusiastic conference held in April 1920, in Tokio.

The attendance comprised a great number of the most prominent lawyers from all parts of the Japanese archipelago, a large contingent from the Philippines (including Chief Justice Malcolm and Professor Lawrence Noble), a good many from China and Siam respectively, and a few from the Dutch East Indies and elsewhere. A brilliant gathering inaugurated the conference, when the Prime Minister (Mr. Hara), the speaker of the House of Lords (Prince Tokingawa), and many others were present on the platform, the total attendance numbering over a thousand.

A full report (in Japanese) of the business proceedings was printed in book form, from which is extracted the Constitution:

1. This Association shall be called "The International Bar Association."

2. The object of this Association shall be to promote justice by the co-operation of the members of the Bar throughout the world.

[1] *Revised Statutes*, 1906, c. 139, s 59.

3. Any person shall be eligible to membership in this Association who is a member of the Bar Association of his own country, and is recommended by the representatives of that Association.

4. This Association shall hold a general meeting once a year.

5. The President, the Secretary, and the Treasurer shall be elected at each General Meeting for the year ensuing from among the members of that National Bar Association in whose country the next meeting is to be held, upon recommendation of that Association. The term of their offices shall expire upon the close of the next General Meeting, but the officers shall continue to carry on business until the election of their successors.

6. Matters to be submitted to the consideration of the General Meeting shall be agreed upon by a majority of not less than two-thirds of the votes of the Representative Committee.

7. The order of business at the General Meeting shall be as follows :—

(1) The report of matters considered at the preceding General Meeting.
(2) The report of the Treasurer.
(3) The report of matters that have received the attention of the Representative Committee during the year.
(4) Consideration of matters submitted to the General Meeting.
(5) Announcement of the selection made by the Representative Committee as to the country in which the next General Meeting shall be held.
(6) Election of the President, the Secretary, and the Treasurer for the ensuing year.

8. The procedure of the General Meeting shall be governed by the usual parliamentary rules.

9. The Representative Committee shall be composed of the representatives of National Bar Associations.

10. Each National Bar Association shall elect annually such number of representatives as it may deem expedient, these to serve on the Representative Committee and be entitled collectively to one vote only.

11. The Representative Committee shall name the country in which the next General Meeting shall be held.

12. The Representative Committee shall, in accordance with the provisions of Article 6, consider and resolve upon matters to be submitted to the consideration of the General Meeting.

13. Each member shall pay to the Treasurer annual dues of five dollars gold, or their equivalent, to the Treasury of the Association before the 30th day of April each year.

14. Any member who is forbidden to practise in his own country, or is disqualified as a member of his National Bar Association shall forthwith cease to be a member of this Association.

The locale of the next meeting is understood to be Pekin (in September, 1921). It may be added that the accompanying festivities in Tokio proved an immense success, Dr. Masujima, who is barrister-at-law of the Middle Temple, gave a lunch, the Siamese and Chinese delegates each gave a dinner in western style at Lukes' and there were Japanese dinners at the well-known "Maple Club" and at Ueno Park.

Altogether, the new movement has begun with enthusiasm and vigour, and it is impossible not to feel that it has a notable future. Dr. Masujima, who may be regarded as its leader, has fortunately an unbounded regard and admiration for the principles and ideals of English Law. At the present moment he is planning an English Law Institute and Library, to be erected on a central site in the city of Tokio, and those who wish to further the ideals of England in the East might do well to communicate with him with a view to rendering its equipment more complete.

T. B.

NOTES.

Uniformity of Legislation in Canada.—In accordance with the recommendation of the Conference of Commissioners on Uniformity of Legislation in Canada (quoted in the *Journal*, 3rd series, vol. i, p. 157, January 1920), the provinces of New Brunswick, Ontario, and Prince Edward Island adopted in 1920 the Partnership Act, 1890, with the result that this statute is now in force in all the provinces of Canada except Quebec.

The Sale of Goods Act, 1893, is now in the same position. The provinces of New Brunswick and Prince Edward Island adopted the statute in 1919 at the instance of the Conference of Commissioners, and the province of Ontario has now (1920) done likewise. (Cf. the *Journal*, 3rd Series, vol. ii. pp. 78, 79). While the Ontario Sale of Goods Act is in most respects a transcript of the original statute, it departs from it in a few particulars. In most of the Provincial statutes the original provision as to market overt (s. 22) is simply omitted. In the Ontario statute it is replaced by a section which provides expressly that the "law relating to market overt shall not apply to any sale of goods which takes place in Ontario."

The provision of the original statute (s. 23) which enacts that a buyer in good faith and without notice from a seller who has a voidable title, acquires a good title is re-enacted, but the next following provision (s. 24), namely, that relating to the revesting of the title to stolen goods in the person from whom they were stolen, is omitted, as the subject seems to be covered in a broader and more logical way by the earlier provision of the statute (s. 21) relating to any sale by a person who is not the owner and who does not sell under the authority or with the consent of the owner. The provision of the original statute (s. 31) relating to delivery by instalments is amended, in accordance with the criticism of the editors of *Benjamin on Sale*, by the insertion of a specific reference to the case of failure to deliver one or more instalments, which possibly is not included in the term "defective deliveries." Sub-s. 3 of s. 32 of the original statute is omitted.

As in the case of most of the provincial statutes, the section-numbers of the original statute have not been preserved. The usual Canadian practice is that s. 1 of a statute contains the short title and s. 2 contains the definitions of terms.

In accordance with the recommendation of the Conference (see *Journal of Comparative Legislation*, 3rd Ser., vol. i, p. 157), the Factors Act was adopted in Prince Edward Island. It is anticipated that it will be enacted by the Manitoba Legislation in 1921. In Quebec, Arts. 1735–54 of the Civil Code are based upon the former English legislation superseded by the Factors Act of 1889. The law of partnership, as contained in the Partnership Act, 1890, has been adopted in New Brunswick, Ontario, and Prince Edward Island in accordance with the recommendations of the Conference, so that the law is now uniform throughout the Dominion with the exception of Quebec. On the subject of limited partnerships there is substantial uniformity. Legitimation by subsequent marriage has been adopted by Manitoba and Prince Edward Island in accordance with the recommendations of the Conference, but in another form by New Brunswick and Saskatchewan.

The Malta Constitution.—In his recent despatch to the Governor of Malta, the Colonial Secretary expresses the decision of His Majesty's Government to grant "full responsible self-government to the people of Malta in all matters of purely local concern."

Whilst making due reservation as regards the exact details of the new Constitution which will have to be discussed fully later on, the Colonial Secretary indicates the main outlines of the proposed scheme.

An essential and fundamental line of distinction is drawn between matters of imperial concern on the one hand and those of Maltese concern on the other. Imperial interests will be controlled by a small nominated Council constituting a supreme executive and legislative authority and comprising, under the chairmanship of the Governor, representatives of all the imperial services. Matters of local interest will be vested in an elected Legislature. The executive heads of the local departments will be members of the Legislature and will be selected by the Governor on the advice of the leader of the majority. Legislation in internal affairs will, consequently, be carried on by parliamentary means, exactly as at home, with a Cabinet responsible to the popular Assembly. The new Constitution establishes, thus, two concurrent forms of government in Malta. This "dyarchy" will be united in the person of the Governor, who will act both as the mouthpiece of the Imperial Government and as the constitutional head of an autonomous colony.

The despatch of the Colonial Secretary does not attempt a clear enumeration of either the reserved or the transferred subjects, and it does not indicate the authority on which the residue of powers will vest. It merely defines imperial interests as those relating "to the general defence of the Empire and the position of Malta as an imperial fortress, dockyard, and maritime centre." But there is no doubt that they will mainly embrace the subjects contained in the Irish Home Rule Bill

and in the Montagu-Chelmsford scheme for India. It can be further presumed that, as laid out in the Devolution scheme now before the House of Commons, the matters which it is proposed to transfer to the elected Legislature will most probably include education, health, housing, agriculture, local government, and private Bill legislation.

The Malta Reform proposals constitute another example of the earnest desire of the British Cabinet to solve the problem of the time by granting self-government to the Colonies without impairing imperial unity, or, in the words of Lord Beaconsfield, as part of a great policy of imperial consolidation. They will certainly mark an appreciable step forward in the political evolution of Malta. The present legislative body is partly elected and partly nominated on a form of government closely resembling that established in the Leeward Islands. Since 1903, when the elected members were placed in a minority owing to their systematic opposition to the educational reforms and the vote of the budget, the Maltese have been clamouring for an elected majority, on a system akin to that of the Bahamas, Barbados, and Bermuda. The provisions, therefore, of the new Constitution greatly exceed the expectations and demands of a few years ago. It is evident that much of its success will depend on the political sense of the Maltese.

The Future of International Law.—The April number of the *Edinburgh Review* contained an interesting paper by Mr. Ronald F. Roxburgh on "The Future of International Law," though "the title," writes Mr. H. J. Randall, "hardly denotes the scope of the essay, which is really a discussion of the underlying conditions that will determine the success or failure of the League of Nations. International Law is usually distributed under the two main headings of War and Peace, but Mr. Roxburgh does not attempt to consider the question of the position that the law of nations will occupy in any future conflict. The subject is doubtless distasteful at the present time, but it is none the less extremely important, and the experience of the war has shown that it will have to be reconsidered from the very foundations. That is a task that only trained jurists can properly perform, with all the assistance that statesmen, soldiers, and sailors can give.

"The author points out that the old principle of the balance of power, so far from being superseded by the League of Nations, is an essential condition upon which the League must rest. The strength of the League, like that of all vital institutions, is derived from the fact that it is a natural and reasonable development of existing arrangements and past efforts. Its success will depend, first, upon the force of opinion behind it, and secondly upon the personality of the men who conduct its operations. It is surrounded by dangers, of which the further development of an aggressive sentiment of nationality is the greatest. The next greatest is the expectation of an easy triumph, and the reaction

that will probably ensue from the inevitable disappointment of such an expectation. Law, and especially international law, is a plant of slow growth."

Another paper from the pen of the same author has appeared in the *American Journal of International Law* (Jan.-April 1920). It is entitled "The Sanctions of International Law." Though it contains nothing original, it is a useful contribution to the subject. The only method of dealing with the matter adequately is to analyse the basis of obedience to private law and then to discover how far this basis extends to international law. Upon these lines the author discusses the sanction of the law of nations in a clear and interesting way. One suspects, however, that the question of the sanction of law ought to be re-analysed in the light of modern theories of social psychology, and such a study in the hands of a competent jurist should yield valuable results.

The Endowment of Motherhood.—The Children's Bureau of the U.S. Department of Labour have brought up to date the report published in 1914 on the subject of mothers' pensions in the United States, Denmark, and New Zealand with the addition of Canada. Since the publication of the previous report the adoption by the State legislatures of the principle of preventing the breaking up of the home when, on account of death or disability, the support of the natural breadwinner of the family is removed, has made considerable progress in the United States. In the course of five years new laws have been enacted and considerable modifications made in the earlier legislation. By the close of the legislative sessions of 1919 "mothers' pension" laws had been adopted in 39 states and in the territories of Alaska and Hawaii. In the remaining nine States—all of which, with the exception of Rhode Island, are in the South—Bills have been under consideration in at least five. The first legislative step for mothers' pensions in Canada was taken in 1916 by the Manitoba Legislature. Saskatchewan followed suit in 1917, and Alberta in 1919. Similar legislation has been under consideration in British Columbia, Nova Scotia, and Ontario. The allowances are partly from the funds of the Province, which then makes a levy on the municipalities for part of the cost. In Saskatchewan the maximum is fixed by law at $3 per week for each child, but in Alberta and Manitoba the amount given is left to be determined by the family's needs. The result is that the amount paid in Manitoba already exceeds the corresponding allowances in communities of the same size and general conditions in the United States. In Denmark the original allowances were increased by 50 per cent. in 1918 to meet the increased cost of living, and in New Zealand the pensions were doubled in amount in 1917 for the same reason. In striking contrast with this record of progress is a report recently issued by the English Ministry of Health containing a survey of the relief given to widows and children during

the year 1919 (Cmd. 744, Stationery Office, 1s. 6d.). A circular was issued in October 1914 by the Local Government Board, and the net result of its issue is summed up by one of the inspectors in the statement that it " has made practically no difference in the administration of relief in the district and its existence was at the time of this investigation generally forgotten." Apart from the question of the methods and amount of assistance, the general summary of the report contains the valuable suggestion that " the provision of a real ' guardian ' (on the analogy of the ' probation officers ') would probably be of greater value than a minimum in the amount of material assistance." English law has much to learn from other systems in its lack of provision for guardianship and adoption of children.

Italian Studies in Comparative Law.—Professor Sarfatti, of the University of Turin and a member of the Italian Bar, is the author of three valuable studies in Comparative Law. The first, " Per una maggior tutela delle obbligazioni di ' fare ' o di ' non fare ' " discusses the enforcement of contracts, and, in particular, criticises the sufficiency of the rule in the French Code, " Toute obligation de faire ou de ne pas faire se résout en dommages et intérête, en cas d'inexécution de la part du débiteur " (Article 1142), and of the corresponding rule in the Italian Civil Code. The two remaining monographs deal with questions of English law, one comparing the conception of implied contracts in English law with that of Italian law, and the other outlining our procedure in civil cases. The importance of such studies as these may be measured by the author's own remark that, while the most authoritative treatises on Italian procedure make a useful comparison between the Italian laws and the new rules of procedure in Germany and Austria . . . English procedure had not up till then been the subject of any critical study in Italy.

South-Western Political Science Association.—A South-Western Political Science Association was formed at Texas in April 1920 to promote the study of political science and its application to the Solution of governmental social problems with particular reference to the South-Western States, viz. Texas, Louisiana, Arkansas, Oklahoma, Arizona, and New Mexico. A new quarterly has been launched by the Association in furtherance of its objects under the editorship of Professor Haines. It is intended to devote special attention to Latin American affairs, and the first number contains a translation of the new Constitution of Uruguay (see *Journ. Comp. Leg.*, 3rd Ser. vol. ii. p. 60). The new publication supplements for an important area the information contained in the *American Political Science Review.*

Notes on Chilean Decisions.—" Two decisions of the Supreme Court," writes Mr. Wyndham A. Bewes, " are reported in the *Revista de Derecho* for 1918, at pages 90 and 253, the former of which decides that a declara-

tion of heirs to a Spanish subject domiciled in Spain, made by a competent Spanish Court, will be carried out in Chile in accordance with the provisions of the Code of Procedure, although there is no treaty obligation which applies. The second case in a more elaborate judgment decides that in such circumstances Spanish law must rule in the title to shares in a Chilean company left by the deceased, as by Article 955 of the Civil Code successions are governed by the law of the domicil of the deceased, which is an exception to the general law of Art. 16 of the same Code, which provides that property in Chile is subject to Chilean law, although its owners are foreigners and do not reside in Chile.

Companies.—"Art. 469 of the Commercial Code authorised the Executive Power to issue regulations carrying out the intention of the chapter devoted to limited companies, and on June 12, 1918, a very important regulation was issued, the main purpose of which was to secure honest administration and to give shareholders greater powers of intervention and of inquiry into the affairs of the company. The details are too many to be enumerated, but among them are to be found provisions (1) making the directors liable for all their acts and for defects and negligence, and (2) obliging them to give security for good administration; (3) forbidding business transactions with a director or any of his relations within the third degree, or with their firms without the authorisation of a general meeting of shareholders; (4) directing the appointment of two inspectors on behalf of the shareholders; (5) forbidding directors, inspectors, managers, and employees to vote as proxies.

"There is an interesting provision in Art. 46, permitting bearer shares to be withdrawn from circulation at the request of the owner on the words 'withdrawn from circulation' being stamped on them by the company.

"In the Code there is but little said about foreign companies, and we must now refer to Title ix. of the Regulation to learn of their standing. Some of the provisions are not new. These companies have to apply for authorisation from the President of the Republic to establish agencies in Chile and lodge a properly authenticated copy of their constitution and proof of their being legally formed and still in existence, a power of attorney to the agent who is to represent them (who is to have full powers to bind his principal and to sue and be sued), a statement of the social capital and its condition, and an authenticated copy of the last balance-sheet.

"In the application for authorisation the agent must state that the company becomes subject to Chilean law as regards all acts, contracts, and obligations which have to take effect in Chilean territory and renounces diplomatic interference with respect to business carried on in that country; that the assets are subject to Chilean law, especially in

respect of obligations to be performed in Chile; that a reserve fund invested in securities realisable in Chile will be formed by 5 per cent. of net profits until the amount of 25 per cent. of the nominal capital is reached; that on the loss of 50 per cent. of the capital the company will be subject to liquidation; that balance-sheets will be published in the *Gazette*; that the company submits to official inspection; that the amount and dates of reception of the cash capital remitted for the Chilean business will be declared and its investment detailed. At least one-third of the capital must be subscribed and paid up. Banks must prove a capital invested in Chilean securities to the satisfaction of the President of the Republic." (*Revista de Derecho* (1918), p. 19.)

Nationality.—" Twenty-one young men born of Peruvian parents in the province of Tacna failed to obey the Chilean summons to perform their military training. They claimed to be Peruvians born on Peruvian soil, while the Chilean Government asserted that they were Chilean subjects, born on Chilean soil. The trouble, of course, arose under the Treaty of Ancón of October 20, 1883, of which ratifications were exchanged on March 20, 1884, whereby the provinces of Tacna and Arica, which had been occupied by the Chilean troops, passed into the possession of that Republic for the term of ten years, being subjected for that time to its laws and authorities. At the end of that time a plebiscite of the inhabitants was to have been taken to decide whether the territory should come definitively under the sovereignty of Chile or should continue Peruvian. As all the world knows, that plebiscite is still in the air, for reasons which need not be discussed. It is curious that though the question of the nationality of persons born on the disputed territory has often been raised, no decision of the Supreme Court has been formulated. The inferior Courts have given judgments, sometimes one way, sometimes another. The advocate for the defence relied chiefly on the analogy of the Civil Law on Possession, a contention which was hardly referred to in the judgment, which held that from the time of the Treaty all the element of Sovereignty, including legislation, administration, and executive acts, had been solely and properly performed by Chile, that the failure to take the plebiscite made no difference, that the terms of the Chilean Constitution were authoritative in claiming as subjects all persons born on Chilean soil, and must prevail over any doctrine of international law, if any such were applicable.

" Perhaps there is some hint here which should be considered by those whose duty it is to frame something like Constitutions for States of imperfect sovereignty. Will future children born (say) in Mesopotamia be British or not, or will the League of Nations have subjects of its own, and on what principle anyway? "

Transactions of the Grotius Society.—It is only possible to name most of the interesting " problems of peace and war " discussed in the

5th volume of the *Transactions of the Grotius Society*.[1] Mr. Knight presents some of the results of his researches into the life of Grotius in England, and Mr. Whittuck analyses proposals for an international Court; Mr. Phillimore and Dr. Bellot review the treatment of prisoners of war; Admiral Sir R. Custance and Rear-Admiral Hall discuss the strategic aspects of the freedom of the seas controversy and submarine warfare; Dr. Darby recounts an eighteenth-century plan of Turkish settlement; Major Davies proposes an international police force, and Mr. Keen, Mr. McCurdy, and the Right Hon. Syed Ameer Ali discuss problems occasioned by the League; Miss Sanger explains the new international labour legislation.

It would have been invidious to select any one of these papers for special comment, had not the meeting of a committee of international jurists to formulate plans for an international court of justice brought the subject of Mr. Whittuck's study into special prominence. The Council of the League is called upon by Art. 14 of the Covenant to submit a scheme to the members, and looked to the committee for guidance. To this Court, when set up, some of the treaties of settlement have already referred future differences of certain kinds. Mr. Whittuck points truly to the advantages enjoyed by a Court with permanent judges and in continuous session over an arbitral tribunal constituted *ad hoc*, and showing "a disposition to avoid detailed discussion of the legal bearing of the case and a preference for compromise." A court of justice could alone guarantee consistency in the application of legal principles, and build up an adequate structure of law. Rules of international law developed in this way might well be more effectual than treaty-made compromises engendered in the unreal and tired atmosphere of the conference chamber. Mr. Whittuck regrets that the Court has under Art. 14 no power to summon unwilling litigants before it. But perhaps such a power would be of little value, and might bring the Court to ruin, unless the Court had already earned such confidence by its successes that the community of States could be trusted to enforce obedience to its decrees.

The Canadian Constitution.—"The advent to office of a new Government in Canada, consequent on the resignation of Sir Robert Borden, whose great services to the Empire have unhappily only been rendered at expense of health, makes reference appropriate," writes Professor Berriedale Keith, "to the recommendations of the Select Committee of the Senate on the Machinery of Government which reported last year. The report is of special interest in that it was based on a very careful review of the changes in administration effected in the United Kingdom under war conditions, and of the reports of Lord Haldane's Committee on the Machinery of Government and of the Select Committee

[1] Sweet and Maxwell, London, 1920.

of the House of Commons on National Expenditure. The Committee found that the plan of creating a distinction between a Cabinet with deliberative functions and Ministers with executive powers was not likely to prove suitable to Canada, but they condemned the practice of having large Cabinets, and suggested the restriction of the number to ten, Under-Secretaries being appointed to relieve the members of the Cabinet of the many less important duties, which at present engage much of their time and preclude effective deliberation on topics of prime importance. They recommended also the appointment of two permanent boards to assist the Government and Parliament in the performance of their duties in connection with the tariff and public works, perhaps the most contentious of Canadian topics. The Tariff Board would be charged with the investigation of all problems connected with production, transportation, and conditions of life in Canada and competing countries, in so far as tariffs entered into these questions; it would have no power of recommendation, but its investigations and reports would smooth the path for governmental action. The Public Works Board would investigate all proposals for expenditure, departmental or other, on public works, and be empowered to employ experts and to propose alternative schemes, and no findings of Parliament should be arrived at until the views of the Board had been laid before it. A further suggestion of the Committee would modify the doctrine of ministerial responsibility by holding the Cabinet responsible for policy only, each minister being individually responsible for his executive actions.

"It is interesting to note the stress laid by the Committee on the necessity of the inauguration of a central service for the collection and collation of information on matters of public interest for the use of legislators and others concerned. It is not necessary, in their opinion, that the documents should be gathered under one roof, but only that there should be a place at which the inquirer could ascertain promptly the information which existed on any subject and where it could be obtained. The importance of the establishment of such a clearing house in London, for which a foundation has been provided by the work of this Society, has already been pointed out by Mr. Bedwell,[1] and there is little doubt that such an institution would be of imperial interest also."

Legitimation by Subsequent Marriage.—Mr. J. Dundas White, in the *Law Quarterly Review* (July 1920), restates the case for incorporating the law of legitimation by subsequent marriage in the law of England. His article is based upon the contribution by Sir Denis Fitzpatrick to the *Journal of Comparative Legislation* (vol. vi, p. 22) in 1904. Legitimation has been recognised under the Colonial Marriages (Deceased Wife's Sister) Act, 1906, and the Finance (1909–10) Act, 1910. In the present

[1] Above, pp. 144-52.

session of Parliament general assent has been given to a clause in another Bill. Mr. Dundas White, therefore, compares the methods of legitimation in the legislation of different countries and discusses the question whether the legitimation should extend to all pre-marital children or only to pre-marital children at the time of whose birth the parents were legally free to marry.

Race Mixture in Canada.—On the subject of laws relating to race mixture in Canada, Dr. Duncan Scott, Deputy-Superintendent-General of Indian Affairs, writes. "This question is one that does not assume any great prominence among Canadian sociological problems. There is not, nor has there ever been, any stigma attached to mixed blood in this country. The status of an Indian, as such, is determined by the provisions of the Indian Act, being Chap. 81, R.S.C. Under the provisions of paragraph 'f' of s. 2 of the said Act, an Indian is defined as follows: 'Indian' means (i) any male person of Indian blood reputed to belong to a particular band; (ii) any child of such person; (iii) any woman who is or was lawfully married to such person."

"Children take the status of the male parent, irrespective of the proportion of Indian blood that such parent may have. Membership of Indian bands does not therefore depend on any degree of blood. For example, if an Indian should marry a white woman the children of such marriage are Indians, and, should their male children marry white women, the children of such marriages are still Indians. On the other hand, under the provisions of the said Indian Act, an Indian woman who marries anyone other than an Indian ceases to be an Indian within the meaning of the Act. Her children by such marriage are accordingly not Indians. It follows, therefore, that many who are Indians within the law are as a matter of fact practically white, while others who are white people under the law may have a considerable proportion of Indian blood. There is no legislation in Canada having the effect of making mixed marriages a punishable offence, and among the Indians there are no customs forbidding marriage between persons of different castes, as the caste system or anything corresponding to it is not found among any of the native races."

Adoption.—Sir Alfred Hopkinson's article in the January number of the *Journal* suggesting the appointment of "a small committee, including both lawyers and men and women who have been engaged in social work, to draft a bill" on the subject has been followed by his selection by the Home Secretary as chairman of a committee to consider "(1) whether it is desirable to make legal provision for the adoption of children in this country, and (2) if so, what form such provision should take." Copies of Sir Alfred Hopkinson's article in separate form can be obtained at the price of 1s. each.

The Right Hon. Sir Samuel Griffith.—By the death of Sir Samuel

Griffith on August 9, the Empire has lost a great lawyer as well as a distinguished politician. His career, of which details were given with his portrait in the fourteenth volume of the Society's *Journal*, was begun as a barrister in Queensland. Entering the Legislative Assembly in 1872, Griffith finally became Prime Minister in 1883 and represented the State at the Jubilee of 1887. In 1903 his political career came to an end by his appointment as Chief Justice of the State, and ten years later he became first Chief Justice of the Commonwealth High Court. In the remarkable series of lucid judgments delivered during fifteen years he endeavoured to establish a consistent body of law, especially upon the constitutional problems which came for final decision before the High Court. As a member of the Council the late Chief Justice had for many years been interested in the work of the Society of Comparative Legislation.

International Red Cross.—*La Revue Internationale de la Croix Rouge* is the monthly publication of the International Red Cross, which deals with a variety of topics falling within the scope of international charity in peace no less than in war. On the latter side special attention is given (1) to the effect of modern science on war, with regard to which the Red Cross protested early in 1918 to the belligerents against the increasing tendency to swell the toll of life; the refinement of cruelty in the methods of taking life, such as asphyxiating and poisonous gases: (2) the work of tracing the missing and giving help and care to the prisoners of war, especially mentioning the work of the German Roman Catholic Bureau at Paderborn, and the similar Swiss organisations: (3) the international agreement and national legislation as regards the care of the graves of the fallen. On the peace side there is valuable information collected with regard to international hygiene, viz. the Inter-Governmental Conference held at Vienna in April 1916 on measures to fight epidemic diseases, attended by representatives of Czecho-Slovakia, Jugo-Slavia, Germany, Austria, Italy, Ukraine, Hungary, a conference of specialists and a variety of branches of hygiene held at Cannes in April of this year. The International Committe also receives reports of the work and organisation of all the Red Cross Societies. During the war the Red Cross received many appeals from belligerent countries to use its influence in obtaining amelioration of the conditions of the wounded and suffering combatants and prisoners of war; and there is every reason for its being given an enlarged scope of action in future wars, by being allowed from the outset power of inspection and supervision on the humanitarian side of war, by international agreement. With Geneva as the seat of the League of Nations, it will have a direct local connection with the central international organisation of the future, and both in war and peace it will have a special opportunity of unifying medical and humanitarian theory and practice everywhere.

NOTICES OF BOOKS.

BRITISH WAR ADMINISTRATION.

A VOLUME [1] of the series of *Preliminary Economic Studies of the War*, published by the Carnegie Endowment for International Peace, in the Division of Economics and History, aims at presenting " a systematic and somewhat comprehensive account of the manifold changes in the machinery of governmental administration in the United Kingdom of Great Britain and Ireland, which have been made during and as a result of the war." But, though comprehensive, it contains " only a preliminary survey, and by no means gives an exhaustive account of the subject." The arrangement of the contents is well planned. The historical matter included, for instance, the " War Measures in Former Times," and the accounts of Naval and Army Administration before the Great War have their interest, but might have been omitted, as not being essential to the main purpose of the work. This survey gives a good idea of the enormous labours entailed on the Government and the country by the war. An Appendix contains a list of the 405 Official Commissions and Committees set up in the United Kingdom to deal with public questions arising out of the war, besides lists of the Defence of the Realm Regulations, and of the subdivisions of departmental organisation, which appear to have been carefully prepared. The work claims to cover " the ground with a fair degree of completeness to the end of 1917," but not beyond. For this period it will be a valuable work of reference, should similar circumstances unfortunately recur. The writer does not limit himself to statements of fact. At p. 52 he suggests the necessity for a still more radical reorganisation of the British administrative system, chiefly by the reduction of the number of main Departments of State. " For example, it might be well to combine the ministries of foreign and colonial affairs." It is hardly conceivable that such a change could ever be contemplated.

C. E. BUCKLAND.

[1] *British War Administration.* By John A. Fairlie, Professor of Political Science, University of Illinois. London: Oxford University Press, 1919. 5*s*.

AGRICULTURAL LEGISLATION.[1]

THE *Annuaire* is a stout quarto volume of 1,260 pages, containing between 600,000 and 700,000 words. No pains are spared to make the record complete and handy for reference. Prefaced by an introduction in English, it gives in French the text of the principal enactments, together with the titles of the less important provisions, on the subject of Agriculture. Two indices are supplied. One is a chronological index by countries; the other, an alphabetical index of subjects. The legislation is grouped under eleven heads. If, for example, the reader desires to study the legislation of foreign countries during the year 1913 on the subject either of the formation of small-holdings or of forestry and the products of forestry, he will find it grouped in part ix., chap. 2, and part iv., chap. 5, respectively.

It is significant that there is no allusion to agricultural legislation other than that of the Allied and neutral countries. No laws, orders, or decrees of the Governments of Germany, Austria, Turkey, Bulgaria, or Russia, appear in the collection. The omission may mean much or nothing. It means nothing if those countries were excluded from want of space or from difficulty in obtaining material. It would mean much for the future if the omission is due to the entire absence of legislative activity on agricultural subjects in those countries.

From the period covered in the present issue of the *Annuaire*, the general character of the contents may be inferred. The war was still raging: the date of its conclusion was entirely uncertain. Two main problems confronted the Governments of the world. One was to feed the people on a restricted scale of consumption at as reasonable a price as possible. The other was to make such provision as was possible for the transition from war to peace when hostilities ceased.

So far as Great Britain was concerned, there was comparatively little legislation. Very numerous Orders were issued under the Defence of the Realm Act, such as those for the regulation of prices for the sale of agricultural produce, or for the distribution of fertilisers and feeding-stuffs. The powers necessary for the increase of production had been obtained and put in force in the preceding year, and it is interesting to note the use made by other Allied and neutral nations of the experience which Great Britain had already obtained. There were, however, five Acts of Parliament passed during the year. Two were in the nature of

[1] *Annuaire International de Législation Agricole; VIIIème Année*, 1918. Rome, 1919.

Effects of the Great War upon Agriculture (Carnegie Endowment for International Peace: Division of Economics and History). By Professor Benjamin H. Hibbard. (London: Oxford University Press, 1919. 5*s*.)

amendments to the legislation of 1916–17. These were the Act to amend s. 11, subs. 3 of the Corn Production Act (August 8, 1918), and the Act to authorise an increase in the amount of land which may be acquired for the purposes of the Small Holdings Colonies Act, 1916 (July 30, 1918). The other three Acts were new. One was the Horse Breeding Act (June 27, 1918), which regulated the use of stallions for breeding purposes. The second was the Land Drainage Act (July 30, 1918), which gave important facilities for the drainage of agricultural land. The third dealt with tithes, and established a quindecennial instead of a septennial average (Tithe Act, 1918, Nov. 21, 1918).

The legislation passed by Allied and neutral nations, with the object of provisioning the people, contained many important measures. Every nation recognised that, in dealing with food-supplies in time of war, the national necessities were paramount. To the urgent need for increased production the proprietary rights of individuals must yield. But the principle of compensation was universally recognised.

In providing for adequate food-supplies, the first step was to ascertain existing stocks and the resources available for their increase. One result of the war will be that every nation is more fully equipped with statistical information as to its means of agricultural production. Where no machinery existed for the purpose, it was set up. In Canada, Portugal, and China, for instance, a statistical service is elaborately organised by the legislation of 1918. Nearly every Government made provision, also, for censuses of stocks in hand, declarations as to the acreage and character of landed properties, returns of livestock of various kinds and of agricultural machinery, and estimates and results of the different harvests of the year.

Having ascertained the quantities of food in sight, and the material available for adding to the supply, Governments addressed themselves to the task of increasing and directing production. Belgium, for instance, regulated minutely the cropping of arable land. Every holding of $2\frac{1}{2}$ acres and upwards is to have three-eighths of the land under cultivation for wheat; one-eighth under potatoes; three-eighths under various fodder crops. On the remaining eighth, crops may be grown for industrial purposes, such as malting barley, sugar-beet, chicory for coffee, or tobacco. Denmark provides that the land-tax may be paid in grain—in wheat or rye, and, when these grains are exhausted, in barley or oats. In France provision is made for the cultivation of derelict or uncultivated land. If the agricultural committee finds land in a derelict condition, it communicates with the departmental committee which control the supply of agricultural labour, fertilisers, etc., and, acting through the mayor of the commune, can enter into occupation of the land and cultivate it for a crop. The principle is applied to other classes of land. Powers are taken to make advances either to existing or substituted occupiers for the purchase of

livestock, seeds, manures, and other necessities of working capital, up to a total limit of 100 million francs. Provision is also made for State assistance in the reclamation of land up to 100 francs per hectare. In Italy the Minister of Agriculture was given wide powers to increase production, including those of distributing labour, tractors and other machinery, implements and fertilisers. He was also authorised to enter into occupation, for a period not exceeding six years, of any land which was improperly or inadequately cultivated. The Swiss law for the intensification of farming is also drastic. Each canton and each commune were instructed to set up a cantonal or communal office, charged with the duty of inspecting the land, directing its cultivation, entering upon and cultivating private and public parks, and, in all cases where their orders are disobeyed or imperfectly executed, replacing the defaulting occupier with a farmer or association of farmers selected by themselves.

The effort to increase production was almost universal. But among the belligerent nations it was obvious that any large advance would be impeded, if not prevented, by the scarcity of male labour. They could, at the best, hope to arrest the decline in food-production and effect some slight increase. But France and Italy laboured under one special disadvantage. They were not only stripped of labour, and unable to supply themselves with fertilisers and machinery. They were also deprived by the invaders of large and productive areas of land. It was inevitable that they should become increasingly dependent on foreign food. At the same time the world's pool of surplus exportable produce was diminished by the cessation of exports from Russia and the interruption of communications with India and Australia. It was this combination of circumstances which gave the United States a position of supreme importance. From her alone could Europe look for such an increased supply as would meet the larger demand, and reinforce the dwindling surplus of the world which was accessible for export.

Professor Hibbard discusses "the effects of the Great War upon agriculture in the United States and Great Britain." It may be pointed out that, so far as the effort of Great Britain is concerned, the history is scarcely carried beyond the end of 1917. It is therefore of comparatively little value. The measures taken by Mr. Lloyd George's Government could not be expected to affect, and as a fact did not very materially affect, the grain harvest of 1917. Entering office, as they did, in December 1916, and faced by a winter of unusual length and severity, they could effect but little improvement in the conditions. The best that could be expected was achieved. The decline in production, which threatened to be serious, was arrested and turned into a slight advance. Scarcely any addition could be made to the area of wheat which, for climatic reasons, is almost entirely sown in the autumn or early winter. But the large addition of nearly a million

acres was made to the spring-sown acreage of oats and potatoes. The huge potato crop of 1917 was the great result in that year of the British effort. But it is mainly by the magnitude of the grain harvest of 1918, and by the immense increase in the production of vegetable products owing to the extension of allotments, that the success of the impulse given to British agriculture can be gauged. For the purpose of forming a judgment on this point, the material was not available for Professor Hibbard at the time of writing.

Whatever efforts belligerent nations might make to stimulate home production, they could not hope to be able to feed themselves. The American continent alone stood between them and acute privations, if not famine. It is this outstanding fact which gives special interest to the effort of the United States. The Editor, Professor Kinley, of the University of Illinois, pays Professor Hibbard a well-merited compliment when he says that the experience of the United States, as narrated in the present volume, may be "helpful in the discussion and solution" of such a problem as "the possibility of a national policy in agricultural production." The facts are marshalled with admirable clearness. If we lay stress on one point only, it is because the debt which Europe at war owed to the American people should be held in everlasting remembrance.

The people of the United States were remote from the scene of war. They commanded adequate supplies of food. Half of the population is rural, and a third is actually on farms. They had, therefore, ready access to agricultural food-products. Yet the American people voluntarily abstained from utilising their own supplies, in order that larger quantities of food might be available for export to the Allies. To eat "within your tether" is common prudence. But voluntarily to restrict your tether in order to feed someone else is a fine act of self-denial. "Wheat-less" days on Mondays and Wednesdays were almost universally accepted. Other means were adopted. The general result was that, in 1918, the consumption per head of wheat, in the form of flour, dropped from 5·3 bushels to 3·93 bushels. This voluntary act of self-denial on the part of the American people enabled the Government to send 110,000,000 bushels of wheat to feed the European Allies out of their harvest of 1917—a quantity, be it observed, which is double the ordinary output of the whole of the British Isles.

ERNLE.

THE COST OF THE WAR.[1]

THE Carnegie Endowment for International Peace have published a book of great interest, systematically arranged so that each portion of the subject can be easily followed, and apparently as complete as laborious care can make it. The direct costs of each country engaged in the war are examined separately, and summarised under the categories of expenditure, by Loans and Treasury Bills, Revenue, Taxation (under various heads). Then the indirect costs—that is, the loss of human life and the casualties, the loss by disease and other causes, the higher death-rate among the civil population, the losses of property, merchant-shipping, and production, the costs of war-relief and to neutral nations, are stated: on their totals general conclusions are based. The figures (in dollars) are "incomprehensible and appalling," as the author says. The total direct costs amount to £37,266 millions, the indirect to £30,322 millions, the combined totals to £67,588 millions. But even these vast sums can take no account of the effects of the war in other directions, such as human misery, to which no monetary value can be assigned.

The figures of the loss of human life are even more terrible than the financial waste. The "actually known dead" are returned as 9,998,771; the "presumed dead" as 2,991,800: total, 12,990,571. The wounded (in various degrees) as 20,297,500; total casualties, as far as known, 33,298,122. The excess costs of the war to Great Britain is calculated at £8,805 millions, met by £1,741 millions from revenue, and £7,011 millions from borrowings. The Empire's loss of life (including the Colonial and Indian casualties) is stated as 807,451 known dead; 617,740 seriously wounded; 1,441,394 otherwise wounded; and 64,907 prisoners or missing. Russia, Germany, and France all suffered even greater losses.

Professor Bogart has much to say on the financing of the war, especially in Great Britain and Germany, giving the facts clearly. But he refrains from entering on the question whether as much was raised from taxation as should have been, or whether Great Britain relied too much upon loans. The German policy was to finance the war by means of loans and paper money. The Germans aimed at avoiding taxation, intending to pay the war-costs ultimately out of indemnities collected from a defeated foe.

C. E. BUCKLAND.

[1] *Direct and Indirect Costs of the Great War.* By Ernest L Bogart. Preliminary Economic Studies of the War. Edited by David Kinley. Carnegie Endowment for International Peace, Division of Economics and History. Oxford University Press, New York, 1919.

OTTOMAN LAND LAWS.[1]

IMMOVABLE property in Cyprus is regulated by Ottoman Law as altered or modified by Cyprus Statute Law, and the volume published under the above title by Mr. Justice Stanley Fisher, Puisne Judge of the Supreme Court of Cyprus, though not amounting to a complete Cypriot Land Code, may be regarded as furnishing a good foundation for the future preparation of such a code. It contains the Ottoman Land Code, and an appendix in which are set out the principal laws and Rules of Court now in force affecting immovable property in the island.

A perusal of the Ottoman Land Code leads one to the conclusion that it would be inadequate to the needs of any other community than a purely agricultural one, or at any rate that it would require a considerable amount of supplemental legislation in order to meet the requirements of the land-owning classes in a country in that stage of development to which Cyprus has attained under British Administration. The Ottoman Land Code appears to have been brought into force in Cyprus in 1878; and the legislation supplementing it, which is in force now and which is contained in the Appendix, began in 1885, and has been growing in volume from that date till the present time. To the text of the Ottoman Land Code Mr. Justice Fisher has added notes of some of the more important judicial decisions upon its construction.

Two of the main characteristics—common, the writer believes, to all Mohammedan land systems—of the Ottoman Code are registration of holdings and penalties for abandonment of land. Later legislation by the Legislature of Cyprus amplifies these provisions and makes registration compulsory, and provides that State land left uncultivated for ten years shall be confiscated by the Government.

Though the land-system of Cyprus may not present any especially interesting features to the general student of land legislation throughout the Empire, this book is of value to a resident of Cyprus, or to any person concerned in any way with immovable property within that jurisdiction.

J. R. I.

JAPANESE PRIVATE INTERNATIONAL LAW.[2]

DR. DE BECKER is already well known for a large number of works on Japanese Law, such as his *Annotated Civil Code* of Japan, and *Commentary on the Japanese Code*, all designed to popularise a knowledge of the

[1] *Ottoman Land Laws*, containing the Ottoman Land Code, and an Appendix of Cyprus Laws and Rules relating to Land By Stanley Fisher, M.A. (Oxford University Press. 12*s*. 6*d*.)

[2] *The International Private Law of Japan.* By J. E. de Becker, LL.B., D.C.L. Pp. iii + 149. Butterworth, 1919.

Japanese legal system among the Western peoples. His latest volume, too, is an endeavour on the same lines:

> to familiarise Western jurists and students of political science with those elementary principles of International Private Law which are at present recognised and applied in the Japanese Empire.

The subject is of particular interest to the jurist, inasmuch as, in Japan, private international law—the author makes constant use of this expression in his text, notwithstanding the title of his work—is a deliberate institution of the Japanese legislature, " a wholesale importation from Europe, slightly modified to suit local conditions and views." The law is contained chiefly in a statute known as the *Law concerning the Application of Laws in General*, together with some others subsequently promulgated, such as the *Law concerning the Application of the Commercial Code.*

The treatise is divided into three parts. The first treats of nationality, the second of the position of aliens in Japan, and the third of the Conflict of Laws. But, throughout, Dr. de Becker refers in considerable detail to the differences between the Japanese and other modern systems of law, as well to their general principles of law as to their particular rules of private international law. So, for instance, while one may gather, in a glance at his pages, much information about the characteristic Japanese law of adoption and the very serious disabilities of aliens in Japan, it is also possible to learn the ages at which legal majority may be attained in quite a large number of other countries, including Persia. Again, in relation to the presumption of death, in accordance with his method, he divides the laws of various countries into classes, in this instance three, describing each—the countries of the French legal system; those of the German; and those of the Anglo-American. The Japanese law, we are told, is modelled upon the German law. Dr. de Becker's method is, therefore, an ambitious one, which would be successfully realised only by one who is omniscient—a criticism which is suggested by our failure to recognise the law of England in his description of the law relative to presumption of death in the Anglo-American system.

Nevertheless, on the whole, Dr. de Becker appears to have more than justified the boldness of his method. It has provided him with a foundation for illustration and reasoning which he has never failed to make the most of, to the very great advantage of all lawyers, and even laymen, concerned in Anglo-Japanese affairs. For those interested in comparative law, especially in Tarde's theory of imitation, this little volume will have exceptional interest and value.

W. S. M. K.

WAR AND PEACE.[1]

THE Introductory Note to the Carnegie Endowment reprint of William Jay's work on international arbitration outlines the circumstances leading up to its original production. John Jay, prominent statesman in the United States during part of their unfriendly relations with Great Britain, and his son William, author of the tractate on War and Peace, propounded plans to induce and oblige nations to settle their disputes without recourse to hostilities. The matured plan was to insert in Treaties articles ensuring arbitration. Neither father nor son claimed his particular plan as a discovery: their object was, in time of peace, to anticipate future differences and provide for their accommodation. The plan of providing, in Treaties, for arbitration is familiar, but it has not always prevented wars.

The reprint contains much matter on the horrors of war which was hardly worth recording, and references to continental history more interesting in 1842 than now. The author saw that no tribunal existed for the decision of national controversies, and believed that, under the circumstances, the idea of a Congress of Nations for the extinction of war was utterly chimerical; but he expressed the hope that some one nation might set an example, and he looked to the United States to teach mankind "the blessings of Peace, as the American Government had been the first to prohibit the Slave Trade and originate temperance reformation."

C. E. BUCKLAND.

LAND REGISTRATION.[2]

MR. HOGG'S book deals with twenty-eight separate systems of registration of title, each based on a separate set of statutes. The most striking feature of these statutes is their diversity, not as regards fundamental points in the systems which they embody, but as regards matters of procedure which, though not properly described as fundamental, yet have an important bearing upon the utility and efficacy of the register kept under the provisions of any particular statute. This is well illustrated by the following extract from Mr. Hogg's comments under the heading, "Trusts, Their Protection and Enforcement":

> There is no uniformity in the treatment of the instrument declaring the trusts. In six jurisdictions—Ireland, Ontario, Manitoba, Saskatchewan,

[1] *War and Peace; the Evils of the First, and a Plan for Preserving the Last.* By William Jay. New York, 1842. Reprinted from the original edition of 1842 by James Brown Scott. New York, 1919. Publications of the Carnegie Endowment for International Peace. Washington.

[2] *Registration of Title to Land throughout the Empire* By James Edward Hogg, M.A. (Oxon), of Lincoln's Inn, Barrister-at-Law, and of the Australian Bar. (London: Sweet & Maxwell. 15*s*.)

Alberta, North-West Territories—no provision is made for filing even a copy of the trust instrument for reference. On the other hand, in British Columbia the trust instrument itself is registered, though separately. In Trinidad-Tobago and Leeward Islands the trust may be registered at the deeds registry, and in Trinidad-Tobago may include unregistered land. In Fiji and Federated Malay States the trust instrument or a copy must be filed. In South Australia it may be filed for reference, or it may be deposited at the deeds registry—though neither course is compulsory—and may include unregistered land. In Queensland and Papua the trusts may either be set out in a schedule to the statutory transfer (or "nomination of trustees"), which is necessarily registered, or they may be contained in a separate instrument, in that case, the trust instrument (which may include unregistered land), or a duplicate or attested copy, must be filed for reference. In the remaining seven jurisdictions—England, New South Wales, Tasmania, Victoria, Western Australia, New Zealand, Jamaica—the trust instrument or a copy may be filed for reference. In New South Wales and Tasmania unregistered land may be included in the trust instrument.

The above passage may also be cited as supplying a typical instance of the great value of certain portions of this book to the draftsman of legislation relating to registration of land title. In such legislation the place in the register of trust instruments has always been a vexed question. It is surprising to read that the learned author has found that in only two jurisdictions—namely Fiji and the Federated Malay States—the law requires trust instruments or copies thereof to be filed in the Registry. Some of the Acts in force in the United States dealing with registration of title contain a provision to this effect, and the writer believes that it would now find a place in any model enactment embodying the best features of the legislation discussed in Mr. Hogg's book.

One of the most interesting and informing portions of this book is that which deals with the effect of notice of unregistered instruments. The cases upon this subject are exhaustively dealt with, and the author notes the tendency shown in modern cases to construe statutes according to their plain language, unaffected by "equitable doctrines"; and he points out, on good authority, that it must now be taken as established that no notice of adverse claims or interests that can only be treated as fraud constructively, or by the extension of equitable doctrines, but implies no dishonesty of conduct, will be effectual against the registered title.

An examination of the subject of notice leads naturally to the consideration of the "caveat" system, which is such a prominent feature of registration of title. This subject is fully dealt with in the book under review, under the heading "Protection by Restrictive Entry." Here, again, the author appears to have considered every judicial decision that could be of assistance or relevant to his commentary. He em-

phasises the close resemblance of the caveat to the injunction, and in the following words seems to summarise correctly the effect of recent decisions on the protection of "interests" in land by "caveat" or any other analogous restrictive entry in the register:

> It must, of course, be borne in mind that "interest" includes a claim to an interest; the whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests, and of interests that have not yet become actual interests in the land.

Throughout the book the systems of registration in force in England and Ireland are contrasted with those of the British oversea Dominions and Dependencies, and the author has thus been successful in achieving an object referred to in his preface—namely, making it possible to compare the relative merits of the two main types of registration of title as they stand to-day—the Australian and the English. Mr. Hogg has been especially helpful in the chapter upon mortgage and other money securities, and a draftsman of bills intended to give effect to schemes of land settlement, either at home or beyond the seas, will find this chapter of the highest value. After reading this chapter, it would indeed be surprising if he were not led to study the rest of the book, and finally to regard the whole volume as not merely useful, but indispensable to his work.

The writer of this notice was for many years connected with the Supreme Court of an important British oversea Dependency, where a system of registration of title to land based upon the Torrens system is in force. He remembers very few trials of any importance in that Court, arising out of a dealing in registered land, in which reference was not made, during the proceedings, to Mr. Hogg's book on the Australian Torrens system either by the Judge himself or by Counsel engaged before him. He ventures to predict that, in a short time, very few Counsel will care to come into court to argue a land case, in any of the jurisdictions falling within the purview of Mr. Hogg's latest book, without its assistance.

J. R. I.

A DICTIONARY OF ANGLO-BELGIAN LAW.[1]

ENGLISH Common Law and French and Belgian Civil Law are so widely different in character and terminology, that it is a task of extreme difficulty to translate exactly from one of these systems into the other.

The authors of this interesting and useful little work were evidently keenly alive to this difficulty. They have wisely avoided the temptation

[1] *Dictionary of Anglo-Belgian Law.* By L. E. F. Anspach, Avocat à la Cour d'Appel de Bruxelles, Conseiller au Conseil Supérieur du Congo, and A. M. Coutanche, of the Middle Temple, Barrister-at-Law, Advocate of the Royal Court of Jersey.

to find an exact equivalent where that equivalent might give rise to a misleading analogy. Thus they have refrained, for example, from translating "Chambre des Mises en Accusations" by "Grand Jury," and in cases of this kind they give a concise explanation of the term under a separately numbered heading. While described as a dictionary, the book is thus much more in the nature of a glossary in a compact and well-ordered shape.

Translation of Anglo-French law terms, difficult even for those who enjoy ample leisure, adds a heavy burden to the daily task of the busy International practitioner, the onerous character of which is rarely appreciated. Indeed, translation of all sorts, instead of being held, as it ought to be, as one of the highest accomplishments attainable in its perfection only through wide experience and accurate knowledge, is generally regarded as a menial and subordinate function. This aspect of the subject has certainly not escaped the authors of this book, originated as it was in the turmoil of military duties, and thus they have made a valuable contribution towards alleviating the task both of the beginner and the experienced translator. Its careful and systematic arrangement will enable the neophyte to avoid many of the pitfalls which await him; and will inspire him, we trust, with becoming humility. It will also have value to those more experienced practitioners for whom rapid and accurate translation is an everyday necessity.

It comprises, amongst other novel features, a catalogue of criminal offences and the penalties attaching to them, and altogether the scheme of the work is so sound that we may look forward to seeing it extended into a more important volume in the future.

O. E. BODINGTON.

THE WORKING OF THE SOUTH AFRICA ACT, 1909.[1]

DR. NATHAN has divided his work upon the government of South Africa into four parts, entitled respectively the Constitution of the Union, Problems of State and Government, Politics, and Social Conditions. Of these parts, the first, which covers 204 out of the 471 pages of the book, will be found the most useful to readers at home. It provides a detailed study of the South Africa Act, 1909, and the statements in the text are supported by frequent references to statutes, reported cases, and writers of repute. The information conveyed in the three remaining parts would appear, on the other hand, to have been designed to serve primarily the requirements of the South African public; and, as such,

[1] *The South African Commonwealth.* By Manfred Nathan, K.C., M.A., LL.D., Member of the Transvaal Provincial Council The Specialty Press of South Africa, Ltd., Johannesburg and Cape Town, 1919.

it presumes a more intimate acquaintance with the conditions of the Union than the great majority of readers in the United Kingdom can claim.

In justification of a new work on this subject, Mr. Nathan points out that, since the Union was constituted (May 31, 1910), there have been two Governors-General and many Ministerial changes; two general elections for the Union Parliament, and three general elections for the Provincial Councils, and "these persons and bodies have been engaged for almost a decade in legislating and in influencing public opinion. . . ." The advantage which this additional field of observation gives him over his predecessors is obvious, since in dealing with the Constitution of the Union, he is thus enabled to make suggestions in respect of "points of weakness" now manifested, and the "desirability, as well as the possibility, of future changes." The validity of this claim is emphasised by the fact that the South Africa Act left a large field of administrative reconstruction to authorities which were to be set up by the Central Government after it had been constituted under the Act itself. Included in this field were the administration of the railways, the amalgamation of the Civil Services of the four Colonies, and the division of revenues as between the Central Government and the Provincial Administrations.

One or two examples will show how new ground has been broken in Mr. Nathan's book. In treating of the legislative powers of the Provincial Councils, he sets out a judgment which throws light upon the question whether the Constitution embodied in the South Africa Act is to be classed as federal or non-federal. The essence of the federal, or dual (to adopt the distinguishing epithet applied by Quick and Garran [1]), system, is the division of the governmental field into "common" and "special" affairs; the former being assigned to a Central Administration, and the latter to Local Administrations. And Freeman holds that the term "Federal Government" may be applied to any union of component members where the degree of union surpasses mere alliance, and the degree of independence possessed by each member surpasses mere municipal freedom. This definition would bring the Union of South Africa under the category of a federal system; since the Provincial Administrations, by virtue of the powers conferred upon them by the Constitution, possess more than mere municipal freedom. And this in spite of the fact that the avowed purpose of the statesmen who framed the South Africa Act was to constitute a "unitary," as against a "federal," system. The view [2] that the Union Constitution retains the essential characteristic of a federal system, but divides the governmental powers, as between the Central and Provincial Authorities, in a manner which favours the Central Government to an extent unknown at the time of Freeman's

[1] *Annotated Constitution of the Australian Commonwealth.*

[2] This view was expressed by the writer in *The Empire on the Anvil*, pp. 215–16.

History of Federal Government, is supported by the judgment delivered by Mr. Justice Bristowe in the case of *Williams and Adendorff* v. *Johannesburg Municipality* ([1915] T.P.D. 106):

> The status of Provincial Councils under the South Africa Act is analogous to that of the Canadian Provincial Legislatures under the British North American Act, 1867. There are no doubt differences between them, of which the most important is that in Canada the Provincial legislative powers are throughout exclusive, while here they are not. But these differences are of degree rather than of kind. The fact that, under the South Africa Act, Provincial statutes may be overridden by a Union Statute does not make the Provincial Councils subordinate Legislatures to the Union Parliament. Within the scope of their authority their powers are as plenary as those of the Dominion Provincial Legislatures. They do not exercise a delegated authority (*i.e.* 'an authority delegated by the Union Parliament), and they are only subordinate Legislatures in the same sense in which the Union Parliament itself is a subordinate Legislature.

On the subject of the limitation of appeals to the Privy Council effected by the Act, Mr. Nathan himself provides a comment which is well worthy of consideration in view of the expected meeting next year of the Special Imperial Conference on inter-Imperial relations.

> The compromise (*i.e.* power to petition for "special leave," but not to appeal as of right) illustrates the sources of weakness which lie in a Constitution not framed by virtue of a direct mandate from the people. The general opinion of the legal profession in South Africa is adverse to any curtailment of the right of appeal to the Judicial Committee. . . . Nor were the people of South Africa at large given an opportunity of expressing their views on this all-important subject, inasmuch as the Constitution was not framed by representatives directly elected for the purpose. The effect of these provisions has been greatly to diminish the number of appeals from South Africa to the Judicial Committee. This is, perhaps, unfortunate from the point of view of the jurist as well as from that of the litigant. The former desires to find an authoritative exposition of jurisprudence by a tribunal which, from its central situation and universal prestige, is able to harmonise the law throughout the Empire, according to the system from which that law is derived; while the latter feels that the same ultimate Court is open to him as to any other inhabitant of the King's Dominions.

Presumably the method of appointment of delegates to the Special Imperial Conference will be left in each case to the decision of the several participating States. It is certainly desirable that any Dominion, which should desire to select its delegates by direct popular election, should be free to adopt this method.

Again, the results obtained by Proportional Representation in South Africa are briefly but sufficiently stated; and on this and other matters

Mr. Nathan contributes data which will be useful to students of the technique of constitutional government. The book deserves a place upon the shelves of Law and University libraries.

W. BASIL WORSFOLD.

THE PROBLEM OF NATIONALITY.[1]

THE problem of nationality is insistent at the present time, and the output of literature upon the subject is attaining large dimensions. In some respects, as in other branches of political theory, the terminology might be made more exact. Without going so far as to say, with Sir J. A. R. Marriott, that "the principle of nationality has defied definition and even analysis," it is true to say that it is a wayward, elusive creature, difficult to catch, and still more difficult to label. No test has yet received general agreement that will serve to differentiate sharply the conceptions of "nation," "people," "nationality," and "body politic," perhaps because the things themselves are very indefinite. As a step towards a more scientific terminology, it might be well to adopt Sidgwick's suggestion, and reserve the term "a nationality" for a body of people possessing the characteristics of a nation that has not attained to political independence, using the word "nation" for those bodies only that have done so; leaving the abstract word "nationality" to denote the characteristics that are common to both.

Dr. Oakesmith's book gives evidence of wide study, but the argument would have gained in force by considerable compression. Its main thesis is that "race" and "nationality" have nothing to do with one another, and this is established by a very lengthy excursion into English history. The book was written for the most part before the outbreak of war, and, after the prolonged discussions that have taken place since then, the thesis hardly seems to require a proof so elaborate.

Mr. Herbert's work is upon a different scale. It is perhaps the best exposition of the whole subject that has appeared, well written, closely argued, and not overloaded with detail. Of course he has not said the last word on the subject, as probably no one ever will; but he has provided a clear-cut summary of the matter. Whether one agrees or not, there is not doubt about the argument, or the reasons for the views expressed. Neither of the definitions of nationality given by the two writers is entirely satisfactory, but they both agree in the psychological character of nationality, and dismiss the objective tests, such as race or language, as untenable.

[1] *Race and Nationality*, by John Oakesmith, D.Lit., 8vo, xix and 300 pp., London 1919. (Wm. Heinemann, 10*s*. 6*d*. net.)

Nationality and its Problems, by Sydney Herbert. Cr. 8vo, ix and 173 p London, 1920. (Methuen & Co., 5*s*. net.)

Mr. Herbert's two last chapters on "Nationality and the Great Society" and the "Future of Nationality" are extremely suggestive. He follows Dr. Zimmern in regarding the cult of nationality as the only cement that will hold together the "uprooted man" that the Industrial Revolution has produced, but to effect this result he looks forward to a non-political form of the doctrine. Political nationalism he regards as a thing of evil, deserving all the strictures that Lord Acton passed upon it. "Nationalism allied with the modern theory of the State is the very definition of tyranny" (p. 133). "Nationalism is in politics what the peasant mind is in economics, a bitterly reactionary thing" (p. 161).

The picture of nationality leading a tame, domesticated life with all its ugly fangs extracted, is doubtless a pleasing one, but can it be realised in fact? In any case, the boundary line between social and political activities is a difficult one to draw for the highly educated mind. For the peasant mind it does not exist. As another writer puts it: "Mr. Zimmern seems to expect that you may have a Gaelic league for the use of Erse, and never proceed to think of an Irish Republic. Actually you do proceed to think of an Irish Republic." Dr. Zimmern and Mr. Herbert might reply to this, that you can have a Cymmrodorion Society in Wales, or a Highland or a Burns Society in Scotland without thinking of a Welsh or Scotch Republic. Mr. Herbert frankly admits the difficulty, but ideals will never be realised unless those who hold them speak out in language that can be understanded of the people. That is just what Mr. Herbert has done.

H. J. R.

PARISH LIFE IN THE SEVENTEENTH CENTURY.[1]

Miss Trotter has written an interesting account of parish life in the seventeenth century—using the term parish in its civil rather than its ecclesiastical sense. One short chapter entitled, "The Anglican Priest and the Church," deals briefly with parish life from an ecclesiastical point of view. It may be doubted whether the clergy of the Church of England in the seventeenth century would, as a body, have cared to be called Anglican Priests. They would probably have preferred the title of Church-Ministers, a title which appears many times in the extracts from the contemporary documents quoted in the chapter.

The officers of the civil parish are described in detail. The Churchwardens and Overseers, the Petty Constable, the Surveyor of Highways, and the Justice of the Peace have all chapters devoted to them, and it is certain that any reader who carefully peruses the pages of this book, with

[1] *Seventeenth Century Life in the Country Parish*, with special reference to Local Government, by Eleanor Trotter, M.A. (Cambridge, at the University Press, 1919.)

its voluminous footnotes, will be in a position to give a good account of the parochial administration of the period to which it relates. We think, however, that the book would have been more interesting to the general reader who wishes to gather a general impression of seventeenth-century life in England if the text had been less interrupted by references to footnotes. Miss Trotter's work is suggestive in connection with the early history of the British dominions across the seas, especially the American colonies, where the parochial organisation was adopted and developed very much on the same lines as those with which the settlers had been familiar in England.

Much of the work performed in the seventeenth century by the parochial officers has by recent legislation been transferred to elective bodies, such as the Parish and Rural District Councils. The Overseers, however, remain with duties much the same, but with paid assistants to relieve them. In the concluding paragraph of the chapter on the Overseers of the Poor, the authoress very truly writes:

> It is evident that the duties of the overseer, if they were to be transacted with any degree of efficiency, were altogether too extensive for the ordinary layman. They needed the detailed, careful attention of a permanent official; they could not be performed by the hard-working farmer or tradesman in his scanty intervals of leisure (p. 80).

The permanent official to help the overseer and to relieve him of most of his duties, though not of his responsibility, has been appointed by later legislation, and at the present time it is only in very small parishes that the overseer himself collects the poor rate, and is not assisted by a salaried officer. Originally, overseers were bound to perform their duties personally; they had no authority to appoint assistants and to charge their salary on the poor rate (*Rex* v. *Gwyer and another*, 4 N. & M. 158); but, in process of time, paid assistants, more or less skilled, were appointed to help them in the execution of their duties. An assistant overseer could be appointed by the Vestry and Justices, and in certain circumstances by the Board of Guardians. A Vestry Clerk could also be appointed to assist the overseers, and the Local Government Board could make an order authorising the Board of Guardians to appoint a collector of the poor rate. The Local Government Act, 1894, simplified matters, and, as regards rural parishes, the Parish Council, or, where there is no Parish Council, then the Parish Meeting could under that Act appoint a salaried assistant overseer to assist the Overseer in all his duties. The result is that, in all parishes of any size, there is now a paid officer, more or less skilled, to assist the overseers in their extensive duties. But the duties of the overseers are less extensive than formerly. Though still authorised to give relief to the poor, and to charge the cost in their accounts, this duty of the overseers has in practice been

transferred to the Board of Guardians, who administer the relief through their relieving officers. Overseers originally were, and still often are, men of considerable position in the parish—they must be "substantial householders," But "substantial" is a relative term, and the direction that overseers are to be selected from among the substantial householders does not exclude labourers from being appointed where persons of substance cannot be found (*R.* v. *Stubbs*, 2 T.R. 395). An overseer, like a petty constable, could be selected from the labouring classes, and the inference drawn by the authoress from the word "substantial" (p. 72) does not seem to be quite warranted.

An account of an average seventeenth-century parish would, perhaps, have been more complete had it contained some reference to the coroner and his duties. The coroner is an officer more ancient than the overseer; his duties, though curtailed by legislation in the last century, were originally defined by 4 Edward I st., 2, as follows: "To go to places where any be slain or suddenly dead or wounded, or where houses be broken or where treasure is found." With so wide a scope of duties, this officer could not have been unknown in country parishes. It is true that he was appointed, not by the parishioners, but by the freeholders of the county, and perhaps this is the explanation of his non-appearance in the pages of this book. The authoress is to be congratulated on the mass of material which she has collected, and on the manner in which she has marshalled it.

R. B. F.

BILLS OF EXCHANGE.

THE scope of Professor Lorenzen's book on Bills of Exchange is so wide, and the mass of information condensed within is so solid, that reviewing it satisfactorily is a matter of some difficulty. All that can be done is to describe the plan of the book and point out some omissions—an ungracious task, in view of the amount of labour that must have gone to the writing of it. The main part of the work is a republication of articles in the *Illinois Law Review* and *Minnesota Law Review*, enlarged by introducing the law of Latin America and Japan. An Appendix is added, by which the value of the text is considerably enhanced, and in this Appendix are printed the American Uniform Negotiable Instruments Act, the English Bills of Exchange Act, the Convention of the Hague,

[1] *The Conflict of Laws relating to Bills and Notes: preceded by a Comparative Study of the Law of Bills and Notes.* By Ernest G. Lorenzen, Professor of Law in Yale University, New Haven. (Yale University Press. London: Humphrey Milford, Oxford University Press, 1919, large octavo, 337 pp.)

The Negotiable Instruments Law Annotated, with References to the English Bills of Exchange Act, Cases, etc. By Joseph Doddridge Brannan, Bursary Professor of Law Emeritus in Harvard University. Third Edition. (Cincinnati: The W. H. Anderson Company, 1920, small octavo, lxviii + 622 pp.)

and the Uniform Law adopted at the Hague, together with comparative tables of sections and articles. Part I of the text of the book consists of a comparison of the Anglo-American law of bills and notes with the provisions adopted by the Convention of the Hague of 1912. Part II contains the rules of the conflict of laws relating to bills and notes. Part III consists of appendices. The "Anglo-American law" is, of course, a mere abstraction. It is naturally impossible to even refer to all the different state laws of the United States, and, apart from this, no mention is made of the oversea Dominions of the British Empire. The Canadian law of bills and notes differs in one or two important respects from that of the United Kingdom. So also does the South African. The Australian Bills of Exchange Act, 1909 (applying to the whole of the Commonwealth) follows the English Acts of 1882 and 1906 very closely, but by no means literally on every point. It will thus be seen that an "Anglo-American law" of bills and notes is not complete on the British side unless more than the statutes of the United Kingdom are included. The English "Bills of Exchange Act," however, which is printed in the Appendix of Dr. Lorenzen's book, is itself an incomplete text of statutory law, for no mention is made of the Bills of Exchange (Crossed Cheques) Act, 1906, which amends s. 82 of the Bills of Exchange Act, 1882, by enacting that a banker receives payment of a crossed cheque for a customer notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof. The work is, in fact, limited (and perhaps necessarily so) to the scope of the continental law of bills and notes only among negotiable instruments. In its ordinary sense an Anglo-American law of bills and notes would include the law of cheques. However disappointing the omission of cheques may be to an English lawyer, it must be admitted that the book as it stands represents a very solid achievement. Apart from the value of the book in cases of actual conflict of laws, English and American lawyers will find it most useful when it becomes necessary for any reason to refer to the English Bills of Exchange Act, or to the American Uniform Negotiable Instruments law, or to correspondences or differences between these two. The volume closes with a bibliography of the subject covering eight pages.

Professor Brannan's book is of much more limited scope, and, since it is nearly twice as bulky (in point of actual print) as Professor Lorenzen's, is, in consequence, woven with correspondingly looser texture. Being a third edition, Professor Brannan's work is well known in America, and may now be accepted as an authority by English lawyers who desiderate help from American authorities in elucidating obscure points under the English law of bills of exchange. But the book is something more than a fully annotated edition of the Negotiable Instruments law in force in most of the American States. Differences between the English

Bills of Exchange Act and the American Uniform Law are pointed out in footnotes, and Appendix I contains a print of such sections of the English Act as have not found a place in the American law, while Appendix II consists of comparative tables showing the corresponding sections. Under s. 82 of the English Act the author has been careful to cite the amending Act of 1906, and as in the case of the first of these books English criticism rather naturally centres on the subject of cheques. Probably it will surprise lawyers who are not in the habit of consulting American authorities to learn that the American code makes no provision for crossed cheques. The English Act, on the other hand, makes no provision for certified cheques. The post-dated cheque seems to have caused as much doubt and difficulty in America as in England. It appears, from the cases cited on p. 400, that the case-law on this subject is by no means settled. It may be observed incidentally in this connection, that the case of *Smith* v. *Field* is not quite correctly stated on p. 400 as it appears in the actual report. The author has cited "English, Scotch, and Irish cases" on the English Bills of Exchange Act. There is still a considerable body of English case-law represented by decisions of the Courts of Canada, Australia, New Zealand, and South Africa on their own statutes, which are for the most part very nearly transcripts of the English Acts of 1882 and 1906, with only occasional differences of importance. The publication of two such books as are here noticed seems to suggest the probability of some American author being first in the field when the time comes for this oversea case-law to be collected and systematised.

JAMES EDWARD HOGG.

AN IMPERIAL DIGEST OF CASE-LAW.[1]

BEFORE the war Messrs. Butterworth & Co. undertook the publication of a work—

> To supply the whole case-law of England, together with a considerable body of cases from the Courts of Scotland, Ireland, the Empire of India, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand and the other colonies beyond the seas, in the most convenient and easily accessible form, and with exhaustive and absolutely complete annotations giving all the subsequent cases in which judicial opinions have been given concerning the English cases digested.

It was a difficult undertaking at the outset, but circumstances have added considerably to the obstacles in producing a publication of this

[1] *The English and Empire Digest, with Complete and Exhaustive Annotations* London: Butterworth, Ltd.)

magnitude. The principle chosen in the compilation of the work is one of selection, especially in the portion relating to the cases decided in the overseas Dominions. The cost and labour would have been substantially increased in producing a comprehensive digest of all the cases in all the Courts of the Empire. But the value of an exhaustive publication is shown in that other great digest of cases decided, under the English common law, in the Courts of the United States, published by the West Publishing Co. How far the scheme of the English and Empire Digest will fulfil the purpose remains to be seen when the work has made further progress. At present there have been published three volumes covering thirteen titles down to bastardy, but deferring bankruptcy to the next volume.

The position of the bar throughout the Empire is one of some interest, so that the title "barrister" may be chosen to ascertain the manner in which the work has been carried out. Browsing through the article, it may be noticed that Mr. Krause made two separate applications for admission to the bars of the Transvaal and the Orange River Colony. The decision in the first case, which is incompletely cited, was followed in the second, decided by two other judges in another Court, although the digested entry appears to refer to only one case. In the same column of the digest is a reference to the rejection of Miss French's application for admission to the bar of British Columbia. But it is difficult to understand a process of selection which omits any reference to the same lady's rejection seven years before by the Supreme Court of New Brunswick, especially as its decision was specifically followed in the later case. This and other references (*e.g.* to *Hordern* v. *Commonwealth and Dominion Line* [1907] 2 K.B. 420 on p. 352) suggest that too much reliance has been placed on digests. Nor can one understand why the report of *Re Nabin Chandra Das Gupta* (1908) I.L.R. 35 Calc. 317 should be omitted in favour of a citation from the *Calcutta Weekly Notes.*

The constantly increasing expense of paper and printing may easily jeopardise the success of this publication, as it has led to the suppression of many others; but it is to be hoped that the publishers will be encouraged to proceed with an undertaking of imperial importance, which should be of considerable value in contributing to the unification of judge-made law in the Courts of the Empire.

C. E. A. B.

JOURNAL OF THE PARLIAMENTS OF THE EMPIRE.

THE first three numbers of the *Journal of the Parliaments of the Empire* (Empire Parliamentary Association, London) fully satisfy the expectations raised by the announcement of the enterprise by the Empire Parliamentary Association. Despite the difficulty of condensation, the editor has succeeded in producing an effective summary of the outstanding legislative proceedings of the Dominion Parliaments, starting from the sessions in which the Peace Treaty with Germany came under review, and from the second number space has also been found for sketches of Australian State legislation. This addition, however, suggests yet another: the legislation of the Canadian provinces is often not inferior in interest or importance to that of the Australian States, and it may be hoped that in course of time it may be possible to extend to it similar treatment, and to include India in the scope of the work.

Proportionately, as is right, the greatest amount of space is allotted to the discussions in the Dominions on the treaties arising out of the war, the system of mandates, and the status of the Dominions, and with all due impartiality there are set out the claims of Sir R. Borden's Government with the criticisms of the Opposition, and General Smuts's duels with the Nationalists, which elicited from him the famous doctrines that the Parliament of the Union alone possesses legislative power over the Union; that the royal veto is extinct save in the case of a Bill for the severance of the allegiance of the Union; and that the Union has full power to appoint and receive diplomatic agents. There is abundant evidence of the distorted light in which European transactions are reflected in the Dominions: Mr. Merriman is revealed denouncing as one of the blackest deeds in the history of Great Britain first the acceptance of a mandate for East Africa, and then the handing over of the mandate and a population of 3,000,000 natives to Belgium to be exploited under the concessionary regime. Not the least useful of the purposes of the Journal will be the rendering available to Dominion politicians of the more accurate information contained in ministerial statements in the Imperial Parliament.

Questions of constitutional interest continually present themselves. There is a piquant contrast between the somewhat inconclusive grounds on which the Speaker of the Union House of Assembly ruled that the Union Parliament could legislate for mandated territory and the care taken by New Zealand to obtain legislative authority from the Crown, though the action of the Union might have been justified by arguments from the new status attained by the Union as a member of the League of Nations. The provisions of the Dominion franchise Bill as to nationality by reason of marriage may conflict with the provisions of

the Imperial British Nationality and Status of Aliens Act, 1914, which are intended to have application throughout the Empire. A point both of international and imperial interest is raised by Mr. Mackenzie King's declaration in favour of deleting the rule that persons who under provincial laws are disqualified from voting at provincial elections may not vote at federal elections. To prohibit a naturalised Japanese or a British Indian otherwise duly qualified from voting on mere racial grounds is plainly unworthy of the Dominion, which is under no obligation to consult provincial prejudice in this regard.

A. BERRIEDALE KEITH.

THE DAWN OF A NEW PATRIOTISM.

THE Clerk of the Executive Council of Alberta has produced an interesting and remarkable book. It is a manual of civics written specially for the people of Alberta, one of the newer and less developed of the provinces of Canada. But, though it contains a good deal that is limited in application to them, the larger portion of its contents is relevant to democracy all the world over. The people of Alberta, it appears, lie scattered in isolated farmsteads, a scanty population spread over wide tracts of territory. It is hard for them to realise that they are members of a community; harder still to get them to take an interest in politics; hardest of all to induce them to enter into public work in earnest. Nevertheless, Mr. Hunt thinks, the whole future of the country depends upon the democracy's rising to the height of its duties and its opportunities. Hence he issues his book as a guide, a stimulus, and an appeal.

The first thing that Mr. Hunt urges is that the citizens should regularly meet together, form study circles or debating societies, and seriously and systematically discuss political and social questions; he gives a number of detailed suggestions for the formation and organisation of such associations. Then, in the body of his book, he provides masses of materials suitable for reading, for general conversation, or for formal debate. These materials are obviously the fruit of wide explorations among books, and of long consideration of civic problems. The quotations which Mr. Hunt furnishes would by themselves suffice to make his volume a treasure; one could wish, however, that he more frequently and precisely indicated the sources from which the extracts come. But more notable even than the striking array of quotations are the chapters in which he expresses his own opinions. These chap-

[1] *The Dawn of a New Patriotism, a Training Course in Citizenship.* By John D. Hunt, Clerk of the Executive Council, Alberta. Pp. xx + 410. (The Macmillan Company of Canada.)

ters are remarkably well written, and the views which they propound are eminently sane and timely.

Mr. Hunt first discusses "the meaning of democracy," emphasising the necessary distinction between the social and political connotations of the term. Then he treats of the perils to which democracy is exposed by the apathy, the selfishness, and the partisanship of its members. Next he proceeds to enumerate the duties of citizenship, to urge the responsibilities of electoral power, and to make an urgent call to service. Having completed what may be described as the political part of the book (chapters i.–ix.) he proceeds to present a rapid historical survey of the development of constitutional government in the world. Interesting though this sketch is, it must be admitted that it does not quite equal in soundness and accuracy the first sections of the work. A few of its statements are demonstrably erroneous, and here and there it gives utterance to views long since abandoned by English authorities. A few examples must suffice. Magna Charta did not either establish or recognise "trial by jury," nor did it stipulate that "without the sanction of parliament no tax of any kind can be imposed, and no law can be made, repealed, or altered" (p. 203). Henry III. did not marry "a Norman wife" (p. 217). The seven bishops in 1688 were not brought to trial for "refusing to read the Declaration of Indulgence from their pulpits" (p. 261). The Triennial Act of 1694 did not "make it necessary to have a new election every third year" (p. 272). It was not Shelburne who succeeded Pitt as Prime Minister in 1806 (p. 276). It was not Cromwell (died 1658) who "passed the Navigation Act" of 1660 (p. 343). The correction of these and a few other slighter slips will perhaps provide useful occupation for the study circles of Alberta. It is to be hoped, however, that they will not unduly dwell upon them, for they are but small blemishes upon what is a really notable and worthy book. In the critical days that lie before the democracies of the world it would be well that the fine and lofty spirit which inspires Mr. Hunt could be widely diffused.

F. J. C. HEARNSHAW.

We have also received the following

The Unrepealed Acts of the Governor-General in Council (Government of India, Legislative Department). (Calcutta: Superintendent of Government Printing. Five rupees.)

Wage Bargaining on the Vessels of the Great Lakes. By H. E. Hoagland. (University of Illinois Studies in the Social Sciences.)

Negro Migration during the War. By Emmett J. Scott (Carnegie Endowment for International Peace). (Oxford: University Press.)

Effects of the War on Money, Credits, and Banking in France and the United States. By B. M. Anderson (Carnegie Endowment for International Peace.) (Oxford. University Press.)

Bulletin Statisque de la République Tcheco-Slovaque. (Prague: Imprimerie "Melantrich.")

The History of Cumulative Voting and Minority Representation in Illinois, 1870–1919. By Blaine F. Moore. (University of Illinois Studies in the Social Sciences.)

The American Municipal Executive. By Russell McCulloch Story. (University of Illinois Studies in the Social Sciences.)

Co-operative and other Organised Methods of Marketing California Horticultural Products. By John William Lloyd. (University of Illinois Studies in the Social Sciences.)

Rapports faits aux Conférences de la Haye de 1899 *et* 1907, *avec une introduction de James Brown Scott.* (Oxford: Humphrey Milford.)

The Journeyman Tailors' Union of America. By Charles Jacob Stowell. (University of Illinois Studies in the Social Sciences.)

Bihar and Orissa Local Statutory Rules and Orders, 1917. 3 vols. (Patna: Superintendent, Government Printing.)

War Thrift and Government Control of the Liquor Business in Great Britain and the United States. By Thomas Nixon Carver. (New York: Oxford University Press, 1919.)

The following periodicals are also received: American Bar Association Journal; American Economic Review; American Political Science Review; Bombay Law Reports; Bulletin meansuel de la Société de Legislation comparée; Bulletin de l'Institut Intermédiaire internationale; Calcutta Weekly Notes; Canadian Law Times; Columbia Law Review; Contemporary Review; Edinburgh Review; Headway; Hindustani Review; International Law Notes; International Review of Agricultural Economics; Journal du Droit International; Journal of the Royal Statistical Society; Juridical Review; Kathiawar Law Reports; Law Quarterly Review; League of Nations Journal; Madras Law Journal; Punjab Law Reports; Revista Italiana di Sociologia; Revista de derecko jurisprudencia; Revue International de la Croix Rouge; Revista Italiana per le Scienze Giuridiche; South African Law Journal; To-day and Tomorrow; U.P. Law Reports.